6 115-2

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~1221~~. 797

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

LAURA KIRK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED NOVEMBER 30, 1883.

attorney, and enters herein its appearance, and files its petition, supported by affidavit, for the *removal of this cause*, for trial to be had in the Circuit Court of the United States for the Western Division of the Western District of Missouri, and also files bond with security, conditioned that it will enter in said United States Circuit Court, on the first day of its next session, copies of the proceedings against it in said cause." R., 53.

The order of the State Court granting the motion is in these words:

"*The City of Kansas* vs. *The St. Louis, Kansas City and Chicago R. R. Co. et al.*

"On this day come the plaintiff herein, the City of Kansas, and come the defendants, the Union Pacific Railway Company, and the application of the Union Pacific Railway Company, *for the removal of this cause* came on to be heard, and the court being well advised in the premises, hereby approve the bond for such removal, and it is hereby ordered *that this cause* be removed to the Circuit Court of the United States for the Western Division of the Western District of Missouri; to which ruling of the Court plaintiff duly excepted." R., 56.

It thus appears that the whole of the proceeding pending in the Jackson County Circuit Court, on the appeals of the various defendants, was removed.

W. HALLETT PHILLIPS,
For Defendants in Error.

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1 *Caption.*

THE STATE OF TEXAS, *County of Harrison:*

At a term of the district court, begun and holden at the city of Marshall, within and for the county of Harrison, before the Honorable A. J. Booty, and ending on the 1st day of July, A. D. 1882, the following case came on for trial, to wit:

Original Petition. Filed Mar. 23, 1881.

THE STATE OF TEXAS, *County of Harrison:*

District Court. April Term, A. D. 1881.

LAURA KIRK
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY. } No. 6993.

To the Honorable the Judge of the District Court of the Second Judicial District of the State of Texas, holding sessions in the County of Harrison and the State aforesaid:

The petition of Laura Kirk, a resident citizen of Harrison county, in the State of Texas, and George Anna Kirk, a resident
2 citizen of Albemarle county, in the State of Virginia, as plaintiffs, against the Texas and Pacific Railway Company, a corporation duly incorporated by various and concurrent acts of the Congress of the United States, and of the Legislature of the State of Texas, having its legal Texas domicile and its principal Texas office in the city of Marshall, and the county of Harrison, in said State of Texas, as *defendants*, respectfully represents:

That the plaintiff, Laura Kirk, is the surviving widow, and the plaintiff, George Anna Kirk, is the surviving mother of William Garth Kirk, late of the county of Harrison, in the State of Texas, now deceased.

That the defendant company, whose corporate title has hereinbefore been set out, is, and was, on and prior to the 6th day of November, A. D. 1880, the owner of and operating a line of railway running from the city of Marshall, in the county of Harrison, to and beyond and westward of the town of Weatherford, in the county of Parker, in the State of Texas.

That said line of railway passed through the county of Wood, in the State of Texas, and by a station on said line of railway, called and known as Lake Fork station, which said station was in
3 said county of Wood, in said State of Texas.

That heretofore, to wit, on and before the said 6th day of November, A. D. 1880, the said defendant company was engaged in running and propelling cars for the conveyance of freight and passengers on the said railway owned by said company, and running through the said counties of Harrison and Wood, in the State of Texas, as aforesaid, as common carriers of freight and passengers,

and that on, to wit, the said 6th day of November, A. D. 1880, the said William Garth Kirk was traveling upon said cars so propelled as aforesaid, as a passenger there and from the town of Mineola to the town of Marshall, on a regular passenger train of cars belonging to and propelled by the said defendant in an easterly direction between the town of Mineola, in the county of Wood, and the city of Marshall, in the county of Harrison, and was considered, treated, and recognized as a passenger on said train by the conductor thereof, who was an authorized agent of said defendant company in the management and direction of said train, and was then in the regular discharge of his duties, and acting within the scope of his authority as said agent when the said train of cars so as afore-
4 said propelled as aforesaid by the said defendant was by reason of and through the gross and criminal carelessness, and negligence of the said defendant company, its agents and servants, a short distance west of Lake Fork station aforesaid, while said train was running at a rapid rate, to wit, at the rate of forty miles per hour, thrown from the track of said railway violently down an embankment of great height, to wit, of the height of thirty feet, by means whereof said train of cars was broken and crushed to pieces, and the said William Garth Kirk, who was on said train as aforesaid, was severely wounded and injured, of which said wounds and injuries said William Garth Kirk, within less than thirty six hours after receiving the same, and as a direct and immediate result thereof, died in the town of Marshall, in the county of Harrison, in the State of Texas.

That the immediate cause which operated to throw the said train of cars so propelled and run by the defendant company as aforesaid at the time and place aforesaid, from the track of said railway as aforesaid, was a broken rail on the track of said railway; that the rail on said track, where said train was thrown therefrom was so
5 badly broken that a large piece, to wit, three feet thereof, was missing; that it was the duty of the defendant company to keep its rails and track in good and perfect order and condition, so that its trains of cars could run over the same without danger; but that said rails and track at the place where said train was thrown therefrom, as aforesaid, was on, to wit, the said 6th day of November, A. D. 1880, and for a long time, to wit, for three months prior to said 6th day of November, A. D. 1880, had been grossly, notoriously, criminally, and carelessly out of repair; that the said defendant knew that said rails and track were out of repair, and knew or could have known, by the exercise of ordinary care and diligence, which by law it was bound to exercise; that the said rail was broken in the place where said train was thrown from said track, but that said defendant wholly failed to repair its said rails and track, and thereby render the propulsion of cars over and on said railway safe to the public and to all persons traveling thereon.

And the said plaintiffs say that the said failure of said de-
6 fendant company to repair and keep its said rails and track

in order, and to exercise proper diligence and care, in inquiring and ascertaining if said rails and track were out of or needed repairs, in order to render the running of the trains thereon safe, was gross, careless, and criminal negligence on the part of said defendant company, through its agents and servants, and, in contemplation of law, renders the conduct of said company towards persons injured by such carelessness or negligence malicious, and entitles these plaintiffs to recover against said defendant company, not only actual, but exemplary damages for the destruction of the life of William Garth Kirk by the said gross carelessness and criminal negligence of said defendant company.

That he was a man of vigorous health, and would have probably lived to a great age, to wit, to the age of eighty years; that the plaintiff, Laura, derived her support and maintenance entirely from the labor and services of the said William Garth Kirk, and that since his death she has no means of support whatever, except her own labor; that the services of her said deceased husband
7 were worth to her a large sum, to wit, the sum of two thousand five hundred dollars per year.

Plaintiff George Anna represents that she derived her support entirely from the labor and services of her said deceased son, William Garth Kirk, and one other son, R. H. Kirk, still surviving, they being her only children.

That the labor and services of her said deceased son were worth to her the sum of, to wit, one hundred dollars per month.

The premises considered plaintiffs represent that an action hath accrued to them as widow and mother of said William Garth Kirk, as aforesaid, against the said defendant company to recover damages as follows, to wit:

Actual damages in favor of said plaintiff Laura, on account of the destruction of the life of her said husband by the said defendant company, the sum of fifty thousand dollars.

Actual damages in favor of the plaintiff George Anna, the sum of twenty-five thousand dollars.

Exemplary damages in favor of both said plaintiffs, to be divided between them as the jury trying the case may direct, in the
8 sum of twenty-five thousand dollars.

And the plaintiffs pray that the said defendant company may be legally summoned to answer this petition, and that after due proceedings herein had the said plaintiffs may have judgment for damages, actual and exemplary, against the said defendant company in the sum of one hundred thousand dollars, and for all costs of suit in this behalf expended, and for all such other and further relief as the said plaintiffs may be entitled to in the premises, in law or equity.

WM. N. A. STEDMAN,
F. B. SEXTON,
Att'ys for Pl'ffs.

File. Original petition. Filed March 23, 1881. Alex. S. Field, clerk D. C., H. Co.

Defendant's First Amended Answer. Filed May 5th, 1881.

STATE OF TEXAS, *Harrison County:*

District Court. Spring Term, 1881.

LAURA and G. A. KIRK *vs.* TEXAS AND PACIFIC RAILWAY COMPANY.

9 Now comes the defendant in the above-entitled cause, and leave of the court being first had and obtained, files this his first amended original answer, and says that the petition of plaintiff filed herein is insufficient in law.

Wherefore it prays judgment, and specially excepting to the sufficiency of said petition, defendant says, that the same is insufficient in this:

(1.) Defendant excepts to that part of said petition which charges that said Kirk was a passenger on said train, and treated as such, because the same is a conclusion of law by the pleader.

(2.) Defendant excepts to that portion of the petition which charges that said defendant "could have known that said track was out of repair by the exercise of ordinary care and diligence, which by law it was bound to exercise," because the same is a conclusion of law upon facts stated.

(3.) Defendant excepts to that portion of the plaintiffs' petition which alleges that "by failure of said defendant to repair and keep its said rails and track in order, and to exercise proper diligence and care in inquiring and ascertaining if said rails and track
10 were out of and needed repairs in order to render the running of trains thereon safe, was gross, careless, and criminal negligence on the part of said company, through its agents and servants, and in contemplation of law renders the conduct of said company towards persons injured by such carelessness or negligence malicious, and entitles these plaintiffs to recover," &c., because the same is a conclusion of law by the pleader, and is an assertion of his opinion of the law to be applied to a certain state of facts, and defendant denies all and singular the allegations contained in said petition, and demands strict proof of same.

And specially answering, defendant says that said accident to said cars, by which said Kirk was injured as alleged, was caused by no fault or omission of care on the part of this defendant, but defendant says that said road and track at the time of said alleged injury, and at the place where the same occurred, was in apparent good condition, and that there were no visible defects in the same.

That said track had a few days before said accident and
11 injury had been fully and carefully inspected at the place where said accident occurred by the officer authorized by said company to inspect the same, and the same was found to be in good, safe condition; and defendant says that if said

cars were thrown from said track by reason of a broken rail, that the alleged defect in said track was not known, and could not have been known to defendant, because defendant says that said track was very recently before said accident thoroughly and carefully inspected at the place where said accident occurred by the agents of defendant authorized to inspect the same, and that whenever said track needed repairs, that the same was then and there fully and safely repaired; and defendant says that said accident was not on account of defendant's failure to inspect said track and keep the same in repair, but was from a cause which defendant could not foresee, and over which defendant had no control, to wit, that on about the said 6th day of November, and on that date, there came a sudden cold spell which caused the rails on said track to suddenly contract, and which rendered the same more liable to break
12 when trains passed over the same, and defendant says that if said rail broke at all it was on account of said cold weather; and defendant says that it employs competent and skillful agents to inspect its track, and that it employed competent and skillful agents to purchase the iron for its track, and that the rails for said track, including the rails herein alleged to have been broken, were good, strong, safe rails, and made and constructed after the most approved fashion. Wherefore defendant says that said accident and injury alleged were caused by said cold spell, and not by any fault or omission on the part of the defendant, all which defendant is ready to verify; and defendant says that recently, before said accident, that the rail which was broken, as alleged, was particularly and carefully inspected by the agent authorized to inspect the same, and that there was no defect apparent or otherwise that could be found by said inspection, but that said rail was apparently and, as
13 far as said agent could ascertain by an inspection of the same, in good and safe condition, and free from any defect of any kind, and carefully and properly adjusted to its place in the roadbed.

TURNER & STUART,
Att'ys for Def'd't.

File. Defendant's amended original answer. Filed May 5th, 1882. Alex. S. Field, clerk D. C., H. Co.

Plaintiffs' First Supplemental Petition. Filed May 6th, 1881.

In the District Court of Harrison County, Texas. April Term, 1881.

LAURA and G. A. KIRK
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Now come the plaintiffs in the above entitled cause, and, by leave of the court first obtained, files this their first supplemental petition

in reply to the defendant's amended original answer filed herein May 5th, 1881, and says:

That said amended original answer is insufficient in law,
14 and of this they pray judgment of the court.

And, specially excepting to said amended original answer, plaintiffs say that the same is insufficient in law, because the same fails to allege that the officer of the defendant, alleged to have inspected the defendant's track and road a few days before the accident and injury complained of in plaintiffs' original petition, was a competent and skillful person for that business, nor does the same aver that said road and track was in the best possible condition, as far as human care and foresight could provide, at the time said accident and injury occurred.

Further, specially excepting to said amended original answer, plaintiffs say that the same is insufficient in law, because it does not allege that the broken rail therein mentioned was procured for defendant by a competent and skillful person, nor does the same show that said rail was made by competent and skillful manufacturers,
nor does the same show that said rail was free from defects
15 that might have been discovered by the application of tests known to skillful manufacturers, nor does it show that such manufacturers were free from negligence in making said rail.

For plea to said amended original answer, plaintiffs deny all and singular the allegations therein contained, and demand strict proof thereof, and of this they put themselves upon the country.

F. B. SEXTON, and
W. & N. A. STEDMAN,
Att'ys for Plaintiffs.

File. Plaintiffs' first supplemental petition Filed May 6th, 1881. Alex. S. Field, clerk of the district court of Harrison county, Texas. By J. B. Lewis, deputy.

16 *Petition for Removal to Circuit Court U. S. Filed May 2d*, 1881.

STATE OF TEXAS, *Harrison County:*

Spring Term, 1881. District Court.

LAURA and G. A. KIRK
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

To the honorable judge of the 2d judicial district, Harrison county, Texas:

The petition of the Texas and Pacific Railway Company, the defendant in the above-entitled cause, respectfully shows that the above-entitled suit has been brought, and is pending in the district court of Harrison county, Texas, and is to recover of said defendant the sum of one hundred thousand dollars for damages, wrongs, and injuries alleged to have been committed by said defendant;

that said action is a suit of civil nature at law, and the matter in dispute, exclusive of costs, exceeds five hundred dollars, and arises under the laws of the United States of America.

That defendant is a corporation created, existing, and organized under and by virtue of certain acts of the Congress of the United States, to wit, "An act entitled an act to incorporate the
17 Texas and Pacific Railway Company, and to aid in the construction of its road, and for other purposes," approved March 3d, 1881, and an act supplemental thereto, approved May 2d, 1872. That your petitioner has a defence to the said action arising under and by virtue of a law of the United States, to wit, said act of incorporation. And petitioner shows further that George Anna Kirk, one of the plaintiffs in the above cause, is a non-resident of the State of Texas, being a resident of the State of Virginia, and was a resident thereof at the date of this suit.

And petitioner further shows that it is not a banking corporation, but is a railroad corporation, authorized to construct, own, and maintain a railroad to and from certain places, designated in said acts of Congress above recited.

That your petitioner hereby and herewith offers good and sufficient security for its entering in the circuit court of the United States for the eastern district of Texas, to be held at Jefferson, on the first day of its next term, copies of the record of this suit,
18 copies of all process, pleadings, depositions, testimony, and other proceedings in this cause; that it offers a bond with good and sufficient security, conditioned as required by the laws of the United States for doing such appropriate acts as are required to be done by the laws of the United States, made and provided for the removal of causes into the circuit court of the United States for trial from State courts.

Your petitioner therefore prays that said cause may be removed for trial to the circuit court of the United States for the eastern district of Texas, at Jefferson, and that this court accept the bond and security offered and proceed no further in said cause

TURNER & STUART,
Att'ys for Def'd'ts.

19 STATE OF TEXAS, *Harrison County:*

Personally appeared before me, the undersigned authority, C. B Stuart, Jr., to me well known, who, being sworn, says that he is the attorney for the Texas and Pacific Railway Company, duly authorized by it to appear, manage, conduct, and defend suits to which it is a party in Texas, and to present and file the above petition for the removal of said suit, and further says that the contents and facts stated in the above petition are true.

C. B. STUART, JR.

Sworn to and subscribed before me, this the 2d day of May, 1881.
[SEAL.] J. D. ALFORD,
County Clerk of Harrison County, Texas.

File. Petition for removal to circuit court U. S. Filed May 2d, 1881. Alex. S. Field, clerk district court, Harrison county, Texas.

20 *Bond for Removal to U. S. Circuit Court. Filed May 2, 1881.*

STATE OF TEXAS, *County of Harrison:*

District Court. Spring Term, 1881.

LAURA and G. A. KIRK
vs.
TEXAS AND PACIFIC RAILWAY COMPANY.

Know all men by these presents, that we, The Texas and Pacific Railway Company, as principal, and ——, as sureties, acknowledge ourselves bound to pay unto Laura and G. A. Kirk, the plaintiffs in the above-entitled suit, the sum of one thousand dollars, to be well and truly paid to them, their heirs, executors, administrators, or assigns, if default be made in the condition following:

Whereas the said Laura and G. A. Kirk have commenced a suit in the district court of Harrison county, Texas, and which is pending therein against the said Texas and Pacific Railway Company, and the said defendant has filed its petition and made application for the removal of said suit into the circuit court of the United States of America for the eastern district of Texas, at Jefferson—

Now, therefore, the condition of this obligation is such, that if the Texas and Pacific Railway Company shall enter in the cir-
21 cuit court of the United States for the eastern district of Texas, at Jefferson, on the first day of its next session, copies of the record of said suit, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and then and there appear, and shall do such other acts as are or may be required in the premises by the acts of Congress for the removal of causes from the State courts, and shall pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise of full force.

In witness whereof, we hereto set our hands, this 2d day of May, 1881.

THE TEXAS AND PACIFIC RAILWAY COMPANY.
Per TURNER & STUART, *Att'ys.*
JAS. H. CARTER.
W. H. ROLAND.
J. D. ADAIR.

File. Bond for removal to circuit court U. S. Filed May 2d, 1881. A. S. Field, clerk D. C., H. Co., Texas.

22 *Petition for Removal to U. S. Circuit Court. Filed May 13th, 1881.*

STATE OF TEXAS, *Harrison County:*

District Court. Spring Term, 1881.

LAURA and GEORGE ANNA KIRK
vs.
TEXAS PACIFIC RAILWAY COMPANY.

To the Honorable A. J. Booty, judge 2d judicial district of Texas:

The petition of The Texas and Pacific Railway Company, defendant in the above-entitled cause, respectfully shows to your honor that the above-entitled suit has been brought and is now pending in the district court of Harrison county, Texas, and is to recover of said defendant the sum of one hundred thousand dollars for damages, wrongs, and injuries alleged to have been committed by said defendant.

That said action is a suit of a civil nature at law, and the matter in dispute, exclusive of costs, exceeds five hundred dollars, and arises under the laws of the United States.

That defendant is a corporation created, existing, and organized under and by virtue of certain acts of the Congress of the United States, to wit: An act entitled an act to incorporate the Texas and Pacific Railway Company and to aid in the construction of
23 its road, and for other purposes, approved March 3d, 1871; and an act supplementary thereto, approved May 2d, 1872.

That your petitioner has a defence to said action arising under and by virtue of a law of the United States, to wit, said act of incorporation. And petitioner shows further that said George Anna Kirk, one of the plaintiffs in this suit, is now, and was at the date of the institution of this suit, a citizen of the State of Virginia; that Laura Kirk, the other plaintiff herein, is now a citizen of the State of Texas, and was such at the date of the institution of this suit; and that your petitioner is a private railroad corporation created by an act of the Congress of the United States, approved on the 3d day of March, 1871, and an act amendatory thereto, approved May the 2d, 1872, both hereinbefore more particularly set out; and that said corporation has fixed its domicile and principal business office at the city of Philadelphia and State of Pennsylvania, as it was empowered by law to do. That the meeting of the stockholders and directors of said corporation are appointed for and held at said city of Philadelphia, and that the home and
24 domicile of said corporation is at said city of Philadelphia, and that said corporation is in contemplation of law a citizen of said State of Pennsylvania, and was such at the date of the institution of this suit.

And petitioner further shows that it is not a banking corporation, but is a railroad corporation authorized to construct, own, and

maintain a railroad to and from certain places designated in said acts of Congress above recited.

That your petitioner hereby and herewith offers good and sufficient security for its entering in the circuit court of the United States for the eastern district of Texas, to be held at Jefferson, on the first day of its next term, copies of the records of this suit, copies of all process, pleadings, depositions, testimony, and other proceedings in this cause.

That it offers a bond with good and sufficient security, conditioned as required by the laws of the United States, made and provided for the removal of causes into the circuit court of the United States for trial from State courts.

Your petitioner therefore prays that said cause may be re-
25 moved for trial to the circuit court of the United States for the eastern district of Texas, at Jefferson, and that the court accept the bond and securities herewith offered, and proceed no further in this cause.

TURNER & STUART,
Att'ys for Def'd't.

STATE OF TEXAS, *Harrison County:*

Personally appeared before me, the undersigned authority, C. B. Stuart, Jr., who, being sworn, says that he is an attorney for the Texas and Pacific Railway Company, duly authorized to appear, manage, conduct, and defend suits to which it is a party in Texas, and to present and file the above petition for removal of said suit, and further says that the contents of said petition and the facts therein stated are true.

C. B. STUART, JR.

Sworn to and subscribed before me, this 13th day of May, 1881.
[SEAL.] ALEX. S. FIELD,
Clerk D. C., H. Co.

File. Petition for removal filed May 13th, 1881. Alex. S. Field, Clerk D. C., H. Co.

26 *Bond for Removal to U. S. Circuit Court. Filed May 13th*, 1881.

District Court Harrison County Spring. Term, 1881.

LAURA and GEORGE ANNA KIRK
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Know all men by these presents that we, The Texas and Pacific Railway Company, as principal, and ——— ———, as sureties, acknowledge ourselves bound to pay to Laura Kirk and George Anna Kirk, plaintiffs in the above suit, the sum of one thousand dollars, to be well and truly paid to them, their heirs, executors, administrators, or assigns, if default be made in the conditition following:

Whereas the said Laura Kirk and George Anna Kirk have com-

menced a suit in the district court of Harrison county, Texas, and which is now pending therein against the Texas and Pacific Railway Company, and the said defendant has filed its petition and made application for the removal of said suit into the circuit court of the United States for the eastern district of Texas at Jefferson: Now, therefore, the condition of this obligation is such, that if the Texas and Pacific Railway Company shall enter in the circuit court of the United States for the eastern district of Texas, at Jefferson,
27 on the first day of its next session, copies of the record of said suit, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and then and there appear, and shall do such other appropriate acts as are or may be required in the premises by the acts of Congress for the removal of causes from the State courts, and shall pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that such suit was improperly or wrongfully removed thereto, then this obligation to be null and void; otherwise of full force.

Witness our hands, this 12th day of May, A. D. 1881.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Per TURNER & STUART, *Att'ys.*
J. D. ADAIR.
W. H. ROLAND.

Filed. Bond for removal. Filed May 13th, 1881. Alex. S. Field, D. C., H. Co.

28 *Grounds of Objection to Petition for Removal. Filed May* 13, 1881.

Suit pending in the District Court of Harrison County, Texas. April Term, 1881.

LAURA and G. A. KIRK
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Now come the plaintiffs in the above-entitled cause, and contesting the petition of the defendant for the removal of this cause to the circuit court of the United States for the eastern district of Texas, at Jefferson, say that the same ought to be refused for the following reasons, to wit:

1st. Because said petition is insufficient in law.

2d. Because said petition presents no facts that constitute a defence, arising under the Constitution and laws of the United States, to this action, the fact therein stated as such defence, namely, the alleged incorporation of defendant under a law of the United States, being manifestly no defence herein.

3d. Because it does not appear from said petition that the defendant is either a citizen of any one of the United States or a citi-
zen of any foreign country. The alleged fact of defendants
29 having fixed its domicile in the State of Pennsylvania, not

being sufficient to make defendant a resident of the State, Congress having no power to create an artificial citizen of a State.

4th. Because any law of the United States granting special jurisdictional rights and privileges to corporations created by virtue of act of Congress, if any such law exists, is unconstitutional and void.

5th. Because the Government of the United States has no constitutional authority to create a corporation to construct and operate a railroad in a State.

6th. Because the fact that George Anna Kirk is a citizen of the State of Virginia affords no ground for the removal of this cause into the circuit court of the United States, her co-plaintiff, Laura Kirk, being a citizen of Texas.

7th. Because any act of Congress, if such exists, authorizing the removal of a cause from a State to a United States court, when the ground on which the removal is sought is that the defendant has a defence arising under the Constitution and laws of the United States, without requiring a statement of the facts constituting the defence, is unconstitutonal and void.

30 8th. Because the defendant is not a corporation created, existing, and organized under a law of the United States, but that, for jurisdictional purposes in the State of Texas, the defendant is a consolidated Texas corporation, existing under the following acts of the Legislature of the State of Texas, to wit: First, an act entitled "An act to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean," passed May 24th, 1871; second, an act entitled "An act amendatory of and supplementary to an act entitled 'An act to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean,' passed on the 24th day of May, 1871, passed November 21st, 1871;" third, an act entitled "An act to define the rights of the Texas and Pacific Railway Company within the State of Texas, in order to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean," passed May 2d, 1873. That the defendant accepted all of said acts and availed itself of the benefits conferred by and herein, including all

31 the rights, privileges, powers, and franchises, and land grants (embracing a large quantity of land) made, guaranteed, and received by the State of Texas to the Southern Pacific Railway Company and the Southern Transcontinental Railway Company, both of which were incorporated by acts of the Legislature of the State of Texas; and that defendant has been for several years operating its line of railway, which is situated wholly within the State of Texas, under the charters of said Southern Pacific Railroad Company and Southern Transcontinental Railway Company, with which defendant consolidated by virtue of said acts of the Legislature of the State of Texas, and which, by said consolidation, did not forfeit or surrender their charters, but became merged in and are now represented by defendant, which has its domicile and principal office

in Marshall, Texas, and by reason of said facts, defendant is estopped from denying that it is a Texas corporation.

9th. Because the defendant has not, and cannot in fact have, any defence to this action arising under the Constitution and laws
32 of the United States, nor does this action arise under the laws and Constitution of the United States, as is apparent from the record in this cause in this suit.

10th. Because the effort to remove this cause is an attempt to perpetuate a fraud on the jurisdiction of this court.

The premises considered plaintiffs pray the judgment of the court on the matters of law presented in the foregoing grounds of objection, and they pray that evidence be received touching the disputed question of fact raised by said grounds of objection, and that, on final hearing, this cause be not removed, but that the prayers for such removal he refused, and plaintiffs will ever pray.

F. B. SEXTON,
and WM. & N. A. STEDMAN,
Att'y for Pl'ffs.

File. Grounds of objection to petition for removal to circuit court U. S. Filed May 13th, 1882. Alex. S. Field, clerk D. C., H. Co.

33 *Order of Court overruling Motion of Defendant to remove to U. S. Circuit Court.*

MONDAY *May 16th*, 1881.

LAURA and G. A. KIRK
vs. } 6993.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

The defendant's motion to remove this cause to the United States circuit court for the eastern district of Texas, at Jefferson, coming on to be heard, and the court, after being fully advised therein, doth order that said motion be, and the same is, overruled, to which ruling the defendant excepts.

Statement of Facts agreed Upon.

Plaintiff proved by Mrs. Laura Kirk that she and her husband, W. G. Kirk, were married Oct. 18th, 1880, and that he was killed in a railroad accident on the Texas and Pacific Railroad, near Lake Fork station, and died November 6th, 1880; also that he was twenty-nine years old, and was earning a salary of $150.00 per month at the time of his death.

That W. G. Kirk was stock and fuel agent of defendant
34 at the time of his death.

Plaintiff proved by the Carlisle life taken, and by experts, that Kirk would probably have lived 26 years.

Plaintiffs introduced the following depositions :

Deposition of George Anna Kirk.

In answer to interrogatories, she says:

My name is George Anna Kirk; that she resides in Charlottesville, Virginia; and her age is fifty-seven years.

William Garth Kirk is my son; I knew him; he is dead; he died in Marshall, Texas, on 6th November, A. D. 1880. At the time of his death William Garth Kirk was twenty-eight years old. He would have been twenty-nine on the 15th of December, A. D. 1880.

William Garth Kirk has been healthy, strong, vigorous, and robust all his life; has never suffered from any sickness; he was temperate in all his habits; was very industrious and energetic; he was economical and prudent in his business, and was, as above stated, up to the time of his death. For the past ten years I
35 have derived my support from my two sons, Wm. Garth Kirk and R. H. Kirk. William Garth Kirk, my deceased son, has contributed to my support for the past ten years, an average of about $350 per year, for the past five years about $500 a year, during which time I have had no other source of support or maintenance except that contributed by my other son, R. H. Kirk, which was about one-half as much as that contributed by Wm. Garth Kirk.

The labor and services of Wm. Garth Kirk were worth to me about thirty dollars per month, for the last ten years, and about forty dollars a month, for the last five years. As his wages were advanced, his contributions for my support increased in amount.

To the cross-interrogatories she says that: I have resided for the past ten or fifteen years at my home in Virginia; for the last five years I have been spending the winters in Texas, with my sons. The present is the only winter I have ever spent in Marshall. I was here several times, last winter for the first time.

36 I cannot say what business Wm. Garth Kirk was engaged in during ten or fifteen years previous to his coming to Marshall. For four years before his coming to Marshall he was section foreman on the Texas and Pacific Railway, and resided near Shreveport, Louisiana; prior to that he was in business, and resided in different places in Texas, including Galveston, Houston, Fort Worth, Pittsburg, and a while at Longview.

For the past ten years I resided at my home in Virginia, living apart from my son, W. G. Kirk, until the past five years, since when I have been spending the winters with him. I know his habits. I have been with him, as before stated, and his habits were as before stated. My husband died December 2d, 1854, in Bluffton, South Carolina, where he lived previous to his death. He was a Sea Island cotton and rice planter. I have no separate means of my own. My son, R. H. Kirk, assisted Wm. Garth Kirk, my deceased son, to support me. He contributed to my support about one hundred and fifty dollars per year, on an average,

37 for the past ten years. Wm. Garth Kirk sent me monthly installments of money. Eight hundred dollars per year would be sufficient to support me. At the time of his death, my son was getting one hundred and fifty dollars per month—had been getting it but five or six weeks. I cannot say what salary he has been getting all the time for the past ten or fifteen years. While section foreman, his salary was fifty-four dollars per month, but he made money by boarding his hands. His life was not insured at the time of his death.

Deposition of Lee White, a witness who resides in Wood county, Texas.

In answer to direct interrogatories he says: That he is 30 years of age; lives one and $\frac{1}{4}$ mile east from Lake Fork station, in Wood county; lived there for the past 3 years; lived there on the 6th day of November, A. D. 1880, and had lived there over two years prior to said time; I live four or five hundred yards from the track of the Texas and Pacific Railroad; I remember something
38 of a train of cars being thrown from the track of the Texas and Pacific Railroad about the 6th day of November, 1880; I was not present at the time, but visited the wreck some time afterwards; the train was a passenger train; the wreck occurred about half a mile west from Lake Fork station, and the train was thrown on the north side of the station; I cannot speak of the condition of the Texas & Pacific Railway track from Lake Fork switch to Mineola, not having noticed it particularly, but I passed over the track from where I lived to said station nearly every day for several months prior to and up to the 6th of November, 1880, and the said track was in bad condition; the part of the road which I passed over is a part of the section where the wreck occurred, and was not safe for cars to run over; I do not remember of seeing any rails broken entirely in pieces, but the defects noticed particularly were low and separated joints; there were a great many low joints and points that were separated; I measured some of the spaces between the ends of the rails where they should have been
39 joined together, and found some of such spaces to be 5 or 6 inches in width; the ends of the rails where the joints were so separated were generally sunk down lower than the rest of the track.

There were also along said part of the track a great many old worn and worthless rails in said track.

At the time of said wreck I think there were only the section foreman, and one negro on said section where the wreck occurred, and about two weeks prior to the wreck, I know there was only the section foreman on said section, who had to walk the track himself; there was not at the time of the wreck, nor had there been for several weeks prior thereto, anything like sufficient force on said section to keep it in such order as to make it safe for trains to run over. At the time when there was no one but the section

foreman on said section, the said foreman was crippled, having a sore foot, who said he was not able to do even the track walking.

In answer to the cross-interrogatories, he said he was at home when the wreck occurred. I visited said wreck
40 6 or 8 hours after it occurred. I knew the condition of the section where the wreck occurred, from Lake Fork, switch to opposite where I lived, from having passed over that part of the track for several months prior to the time of the wreck nearly every day. It is a fact that I never did pay strict attention to the exact point where the wreck occurred, until after it occurred.

I noticed that part of the section east from Lake Fork switch, because I passed over it nearly every day for several months prior to the wreck, and I know what force is necessary to keep said section in good condition, from observation; having lived near said section and near the section house of said section for nearly three years, and having been often on said section, and observed the work necessary to be done. I am not a practical railroad man, and only know what force is required to keep the section where the wreck occurred in good order, from observation. It is a fact that I did not examine the exact point of said section where the wreck occurred until after the wreck had taken place, but it is a fact that I had
41 noticed the bad condition of the track on said section from Lake Fork switch eastward to where I lived often previous to the time of the wreck. I have not said that I examined the part of the track where said wreck occurred previous to the wrecking of the train. My memory is not positive as to whether the said train was thrown from the track by a broken rail or by a dislocated joint in the rails. I did not charge my memory particularly with reference to this point, not thinking that I would be called upon to testify with reference thereto; but I do remember from what I saw that it was from a defect in the railing that caused the wreck. I am not certain whether it was a dislocated joint in the railing or a broken rail which threw the rail from the track, nor do I remember the exact location of said defective tie or joint.

Deposition of J. H. Swindle, a witness who lives in Wood county, Texas.

In answer to the direct interrogatories, he says: I am 29 years of age, and live at Lake Fork switch, in Wood county, Texas;
42 have lived there about 13 months; was there on the 6th day of November, 1880, and had been living there 6 or 7 months prior thereto. I lived on the north side of the track of the Texas and Pacific Railway, about 100 yards from and in full view of said track. I remember a train of cars being thrown from the track of the Texas and Pacific Railway about the 6th of November, 1880. It was thrown from the track by a broken rail in said track; said train was a passenger train, and was thrown on the north side of said track, about ½ mile west from Lake Fork station. I cannot speak positively of the condition of said railway track to Mineola, but said track from Lake Fork station west, about one mile to Lake

Fork river, was in a bad condition at the time of said wreck, and had been for several months prior thereto.

The mile of road above mentioned included the place, and was a part of the section where said wreck occurred. Said track was unsafe for any kind of a train of cars to run over. I had not noticed any broken rails prior to the wreck on that part of the track where the wreck
43 occurred, except the one which threw said train from the track, but at the time of the wreck and for several months before, there were many worn and worthless rails, and open and sunk joints in that part of the track. I noticed numbers of spaces between the ends of rails where they should have been joined together of 4 or 5 inches in width, the ends of such rails sunk lower than the rest of the track. On the day previous to the wreck, and on the day of the wreck, there were only the section foreman and one negro, and the section where the wreck occurred one section foreman had gone off of said section a short time previous to said wreck, and for 8 or 10 days prior to and up to the day before said wreck, there had been no one except said negro on said section. The number of men at the time of the wreck, and for two weeks, and maybe for longer time prior thereto, was not sufficient to keep said section in anything like good and safe condition, especially as there had been heavy rains along said section prior to said time when said wreck took place.

44 To the cross-interrogatories the witness Swindle says:

I was at home at the time of the wreck. I visited the place of said wreck about four hours after it occurred. I know the condition of the track of said railway from my house at Lake Fork switch westward, including the place of said wreck to Lake Fork river, because I passed over said portion of the road almost daily going to and returning from my work for several months prior to the time of said wreck, and I further know that either the same train after it had been placed back on the track, or another one, on the same day of the wreck was thrown from the track on the said section about half a mile east of my house by a broken rail. This I saw myself. It is not a fact that I did not notice that part of the track from which the cars were thrown until after the accident and wreck occurred, but the fact is I had noticed ten or fifteen days previous to said wreck that the rail which threw said train from the track was broken. I noticed said track from having passed over it nearly every day previous to the wreck
45 for two or three months, and I only know from observation what force is sufficient to keep said section in good order. I know that the force on the said part of the road at the time of the wreck, and for several weeks previous thereto, did not, and were not, able to keep said section in safe condition. I only know from observation the force necessary to keep said section in good and safe condition. It is not a fact that I did not examine the point where the wreck occurred until after the wreck took place, but the

fact is, that I saw the rail which threw said train from the track ten or fifteen days before the wreck, and it was then broken; I visited said wreck about four hours after it occurred, and saw the broken rail where the train was thrown off, and recognized it as the broken rail I had seen in the track ten or fifteen days before, and upon this I base my opinion as to the cause of the wreck. The broken rail above spoken of was an old rail, and on the end of the bridge.

46 *For plaintiff, R. H. Kirk, sworn and examined.*

By Mr. SEXTON:

Question. You are a brother of Wm. Garth Kirk?

Answer. Yes, sir.

Q. What was he engaged in at the time of his death?

A. He was stock and fuel agent of the S. & P. R'y.

Q. What have you been engaged in?

A. Railroading.

Q. What particular branch?

A. Up to the last year and four years previous as section foreman.

Q. What in the last year or so?

A. One year previous to this I worked in the auditors' department, and since then I have been acting as supervisor.

Q. Road supervisor?

A. Yes, sir; track supervisor.

Q. What is the usual length of a railroad section?

A. Down in this country, on this portion of the road, six miles. Out on the Rio Grande division sections are longer—ten miles.

Q. What number of hands is usually allowed, as far as
47 your experience and observation have gone, to a section of six miles?

A. Owing pretty much to the condition of the track. Generally we were allowed six or eight men, sometimes not so much—sometimes more.

Q. Was there any difference with reference to the seasons?

A. Yes, sir. In summer they reduced the force, and in winter they generally increased the force.

Q. What was usually allowed in, say, October and November?

A. Usually five to six or eight men, owing to the condition of the track.

Q. Taking your experience and observation as a guide, what number of men would you say was necessary in October and November to keep the road in ordinary repair?

A. About six men to the section of six miles.

Q. Suppose the road was in bad condition, and the weather had been bad?

A. It would require more.

Q. What number would you say?

A. I could not say unless I knew exactly the condition of the road.

Q. Do you know anything of that portion of the track
48 where your brother was killed?

A. I had passed over the road several times previous to the wreck, but paid no particular attention to it, but after the wreck I did.

Q. Did you observe the character of the ground on which this portion of the track was built?

A. Yes, sir; in the bottom.

Q. What bottom is that?

A. Lake Fork.

Q. From your observation of Lake Fork bottom, what number of hands would you say were necessary to keep that track in repair in November?

A. If to repair it generally, a good many. If to make it safe so trains could run over, six or eight or ten men at the outside.

Q. The least number?

A. No less than six men would have done it.

Cross-examined by Mr. TURNER:

Q. Where are you working at?

A. Between Baird and Big Springs, on the Rio Grande division.

Q. Do you know what reason exists for the scant force on that section?

A. I do not.

49 Q. Don't you know that the fall of that year up to November had been very dry?

A. I know that a portion of the time had been very dry up to the first of November.

Q. And an excellent fall for railroads?

A. Yes, sir.

Q. Are you older or younger than your brother?

A. Nearly three years younger.

Q. He had been stock and fuel agent only a few weeks, hadn't he?

A. I think very near two months.

Q. How long had he been in the employ of the company?

A. I think since 1875 the last time. He worked a while while they were building between Marshall and Texarkana.

Q. What were his duties as stock and fuel agent?

A. He had charge of all damage claims for stock killed, and was fuel agent.

Q. Did his duties require him to go out much over the road?

A. Yes, very frequently.

Q. In all directions?

A. Yes, sir.

Q. He was required to be on the road a good portion of his time?

50 A. Yes, about half the time I think. Part of the time he was occupied in the office.

Q. He not only attended to the purchase of fuel, but didn't he attend to ties?

A. Yes, sir; he was tie inspector, too.

Q. Did he not frequently go over the road on freight trains?

A. Yes, sir; I think so.

Q. Did they not frequently carry him over the road on hand cars?

A. Yes, sir; when there were no trains.

Q. Were you over any part of this road in October?

A. Yes, sir; I was over the entire length, except the Trans-Continental, from Texarkana to Sherman.

Q. Suppose a piece of rail was broken out of the track nine, ten, or fifteen inches in length, could trains pass over it?

A. I should think they could by going slow.

Q. Could they at ordinary speed?

A. It would not be safe; they might possibly go over it.

Q. A piece entirely out and gone, could a train pass over that without the engineer discovering it?

A. I do not think they could if they were attending to business.

51 Q. And you think it could not pass over it at all?

A. By being very careful and running slow they might possibly get over it—running 10 or 15 miles an hour.

Q. Do you think a piece of iron of that length (exhibiting a piece of broken iron rail)—that is, the end of the rail (pointing)?

A. Yes, sir.

Q. With that piece of rail broken out of and gone from the track, as a railroad man, do you think it possible that trains could pass over the road—the number of trains passing between here and Mineola—fifteen days without wrecking?

A. I could not say.

Q. What is your opinion?

A. I do not think they would. I think some trains would have been wrecked there. If that piece of rail had been gone 15 days I think there would have been a wreck.

Q. Do you think any train could have passed over that?

A. Yes, sir; unless they were running fast.

Q. How about a joint four or five inches broad?

A. They could pass over that if the joint was properly

52 strapped.

Q. It did not render the road dangerous?

A. I could not say; it could not be called in first-class condition.

Q. You do not know whether it would be called dangerous?

A. Some people might call it dangerous. I would not consider it very dangerous if the ties and everything else was sound.

Q. In the distance of a few miles, if there were several joints of that kind, would you not call it a dangerous road?

A. That is owing to the condition of the ties. If they were all spiked it would not be dangerous.

Q. Would a freight train be more liable to wreck than a passenger train?

A. I do not think it would. The trucks on a passenger train are more carefully examined than on a freight, therefore they are less liable to accident as a general thing.

Q. Do you know how many trains run between here and Mineola?

A. I do not.

Q. Some twenty a day?

A. I could not say.

Q. Assuming there were ten trains a day, do you think it possible that ten trains a day could have passed over a railroad track
53 that piece out said connection broken without wrecking it?

A. They might possibly get over it.

W. H. Taylor sworn and examined.

By Mr. SEXTON:

Question. Were you conductor on the last bound passenger train on the Texas and Pacific Railway on the 6th of November, 1880, running from Fort Worth to Marshall?

Answer. Yes, sir.

Q. What number was that called?

A. Number two, from Weatherford.

Q. Did you get all the way through safe?

A. No, sir, we got off the track.

Q. Where?

A. Lake Fork.

Q. Was William Garth Kirk on the train?

A. Yes, sir.

Q. You got off the track at Lake Fork?

A. Near Lake Fork; about one-quarter of a mile west.

Q. How did you get off the track?

A. I suppose we broke a rail.

Q. Was anybody hurt?

A. Yes, sir, several were hurt.

Q. State those who were hurt; was Kirk hurt?

54 A. Yes, sir.

Q. How much?

A. I could not tell. He was speechless, and did not have anything to say. He was put in a coach.

Q. Where was he hurt?

A. About the head and body, I think. I could not tell.

Q. Where did Kirk get on the train?

A. I do not remember; he was with me when I made transfer. I do not recollect whether he got on at Mills' Point or west.

Q. Was he hurt at that accident?

A. Yes, sir.

Q. You assisted in bringing him home?
A. I put him in the coach.
Q. Do you know what resulted from that accident to him?

Mr. TURNER: We admit that he died from the injury.

Q. Were you conductor?
A. I was.

Cross-examined by Mr. TURNER:

Question. How was Kirk traveling, in the capacity of a passenger, or an employé of the road?

Mr. SEXTON: We object. We think it is immaterial whether he was traveling on a pass as an employé or not.
55 The COURT: I will admit the testimony.

Q. How was he traveling, as a passenger or employé of the road?
A. He was traveling as an employé.
Q. Did he present you with a passenger ticket that day?
A. No, sir. I did not ask him for it. I knew he was an employé of the Texas and Pacific Railway Company.
Q. You did not ask for ticket?
A. No, sir; not that day.
Q. It is charged you recognized and treated him as a passenger. Did you so recognize him?
A. I treated him as a free passenger and employé of the road. If he was a passenger I would have collected his ticket or fare.
Q. Did you see his pass that day?
A. I did not.
Q. Did you ever see it?
A. I do not remember whether I ever did or not. He never traveled with me a great deal.
Q. How long had he been occupying the position he then had?
A. I do not know. A few weeks only.
Q. He was tie and fuel agent?
A. Fuel agent, I understand, inspector of road, and I think stock agent also.
Q. You know that he had a pass?
56 A. Yes, sir.
Q. Do you know where that pass is?
A. I do not know; I understand Mr. Dick Thompson had it.
Q. What were Kirk's duties as stock and fuel agent on the road?
A. I suppose to go out and take up wood, attend to the stock that was killed on the road, paying claims, &c.
Q. Did his duties require him to be much over the road?
A. Well, not altogether on passenger trains, no more than on any other trains—on hand car some times.
Q. Did it not require him very frequently to travel over the road on some character of trains?

A. I think it did.

Q. If a road is in bad condition, and any agent or employ travels over it, is it not his duty to report the bad condition to the company?

Mr. SEXTON: We object to the question.

The COURT: The objection is well taken.

Mr. TURNER: We except.

Q. How often did you pass over that road a week during the month of October before this accident?

A. About two trips and a half a week from Weatherford to Marshall.

57 Q. How many times would that carry you [—] the road?

A. Five times.

Q. Is there a side track at Lake Fork station?

A. There is.

Q. What is the length of it?

A. I do not know how much we have there. We have more now than at that time. We had room there then for 24 or 25 cars.

Q. What was the condition of the track; when I allude to the track, I mean the main track—from Lake Fork station west, for distance of half mile—from October up to the 6th of November?

A. Pretty fair. I never felt any uneasiness about it.

Q. How long have you been railroading?

A. Twenty-four years.

Q. What roads?

A. Louisville and Nashville, and Texas and Pacific.

Q. You thought the condition of the road was good?

A. I thought so.

Q. Do you think it was safe?

A. If I had not, I would have reported it.

Q. Did you ever report it was not safe?

A. Only when I found a bad place.

Q. Did you ever notice any breaks in the track at the bridge at Lake Fork, where that accident occurred?

A. No; I never noticed any. I never felt anything there

58 till this accident happened.

Q. Suppose that a piece of iron of that length (referring to the piece of iron exhibited in court, about 75 inches in length) had been out of the track at that accident for 15 days, could a train have passed over it without your noticing it?

A. I do not think it could, very well.

Q. What effect would that have on a train, even if it had passed over; would it jar it?

A. I think so—very much.

Q. Do you think that break in the road could have existed for 15 days without your seeing noticing it?

A. I might not have seen it, but would have felt it. I would have known it was a bad joint or a broken rail.

Q. When did you pass up the road south; before this accident?

A. On the 4th.

Q. Did you pass on the 5th?

A. On the 4th; I left Weatherford on the night of the 5th.

Q. Did you notice any break there then?

A. No, sir.

Q. Did you notice anything about the track that led you to think it was dangerous?

59 A. I did not, no more than at other places on the line.

Q. How was the weather that night—the night of the 5th and the morning of the 6th?

A. It was a clear morning on the 6th.

Q. Cold or hot?

A. It was not very cold, but about the middle of the night cold enough for frost.

Q. Had there been any rain?

A. Some west, but up to that time we had not had a great deal of rain.

Q. Did you examine into the cause of the accident that day?

A. No, sir; I was hurt myself and saw there was no use looking at it.

Q. Where was it?

A. At the west end of the bridge.

Q. Was that across Lake Fork Creek?

A. It was this side of Lake Fork Creek.

Q. How far was this from the end of the switch?

A. I do not suppose it was it was half a mile. The engineer had blown the whistle some time before that.

Q. Do you how many trains are run over the road between Marshall and Mineola per day, both ways?

A. I do not know how [many] at that time or now.

Q. Can you approximate it?

60 A. I suppose some four to six trains in all.

Q. Were there not two passenger trains at that time?

A. Only one a day. There was an accommodation running between Wills Point and Weatherford, but this was the only through passenger.

Q. You say then 6 or 8 trains a day. What would be your opinion, as railroad man, of the effect that a piece of iron of that size broken out of Lake Fork bridge would have on these trains?

A. I do not think, as a railroad man, that a great many trains would pass over without finding it out—not one. The engine and three cars on my train went over, and the other two went off.

Q. You could not tell which car broke the rail?

A. I could not.

Q. What is your judgment as to whether that rail was broken out for 15 days or not?

A. I could not say. I think it must have been very properly spiked down or it would have gone.

Q. Suppose it was broken out and gone?

A. Don't think they would have passed over it without getting off the track.

Q. Do you know what were the conditions of this pass that Mr. Kirk had, if he had one?

61 Mr. SEXTON: We object.

The COURT: I sustain the objection.

Mr. TURNER: We except.

Q. Mr. Kirk paid no fare that day?

A. No, sir.

Q. And you did not call on him for fare?

A. I did not.

Q. Was he traveling over the road in the line of his duties as stock agent?

A. If he was not, I should have asked for it.

Q. Did you understand it that way?

Mr. SEXTON: We object.

Q. In what capacity was the traveling over the road; as a passenger or as fuel agent of the company?

A. Of course I recognized him at the time as traveling.

Mr. SEXTON: We object.

Q. He never paid or offered to you any fare?

A. I never collected any from him that I know of.

Re-direct by Mr. SEXTON:

Question. You did not demand any fare?

Answer. I did not.

Q. You have been a conductor of trains?

A. For some time.

Q. Altogether.

A. No; not altogether.

Q. What else?

A. I have acted as agent.

Q. Have you ever had anything to do with the track?

62 A. Yes; on a construction train.

Q. Never have worked as supervisor, roadmaster, or in blacksmith shop?

A. No, sir.

Q. You say previous to this accident you did not discover anything on the road you felt it your duty to report?

A. Not at that point.

Q. I want to ask you if this piece of iron connected with its mate was on the track broken, but not out, and this connected with the next succeeding piece by the fish bars; if that had been broken simply, but remained on the track for 5, 10, or 15 days previous to this accident, whether trains could or could not have passed over it?

A. I could not say positively that they could without feeling it.

Q. Could you say positively that they could not?

A. They might do it provided that rail rested on the tie.
Q. How far do the fish plates project over and beyond the holes?
A. About two inches.
Q. Is not the end spiked down very closely?
A. They don't spike there at all; they put in the fish
63 plates and spike further back, beyond the fish plates.
Q. Then the spike and fish plates both hold it to its place?
A. Yes, sir.
Q. You were hurt yourself at that accident?
A. Yes, sir.
Q. Some others were hurt.
A. Yes, sir.
Q. Do you know when this piece of iron was brought in?
A. I do not.
Q. Do you know who brought it in?
A. I do not.
Q. Did you look at what caused the accident that night?
A. It happened in the morning after daylight.
Q. Did you look to see what caused it?
A. No, sir; some of the employees said it was a broken rail.
Q. What was the height of the embankment?
A. About six and a half or seven feet.
Q. The coaches that went off fell down the embankment?
A. No, sir; they turned over on the bridge.
Q. How was the road along that region at the time—very irregular?
A. I cannot say it was.
Q. Were there not a good many high and low places in it?
64 A. Not that I noticed particularly; nothing that I felt any uneasiness about.
Q. You did not yourself go out to examine the track?
A. I did not.
Q. Any part of your duty to do it?
A. Yes; but there was enough to show for itself.
Q. You mean you do not examine the track; you run over while running, unless you have some warning of danger; unless you are flagged you do not stop.
A. Not unless we feel something; when we stop, go back, locate it, and have it repaired.
Q. When you are running over ordinary track and feel a bump or jerk, you do not stop?
A. We notify the first section gang.

Re-cross-examined by Mr. TURNER:

Question. You were asked whether you demanded any fare from Mr. Kirk; you said no. Why did you not demand fare from him?
Answer. Simply because I had examined his pass before, and I knew he was an employee of the company; I did not think he had been relieved.

65 Q. Is it not your duty to report anything wrong or dangerous about the track in any way?

A. Yes, sir; as much my duty as anybody elses.

Q. And you never found anything wrong in this track that justified your reporting it to the company?

A. No, sir.

Q. And you thought it altogether safe?

A. I did.

By Mr. SEXTON:

Q. You reported this accident to the company after it happened?

A. Yes, sir; I did.

Q. You treated Mr. Kirk, I think you said, as a free passenger?

A. Yes, sir; took just as good care of him as if he was any other kind of a passenger.

Plaintiff rested.

For Defendant, J. T. Horn, Sworn and Examined.

By Mr. TURNER:

Question. Where do you live?

Answer. Am an employee of the road; have no particular place of residence.

66 Q. Where were you employed, and how, in 1880?

A. As supervisor.

Q. Of what?

A. Of the second district; it extends from Bolton to Willow Springs.

Q. Did that include Lake Fork?

A. Yes, sir.

Q. What were your duties as supervisor?

A. To look over the track and have it repaired when it needed it.

Q. How often did your duties call you over that portion of the road?

A. Daily, as often as I could get over it; I was over it every day.

Q. How would you travel over the road?

A. On foot, on the trains, hand-car, and velocipede.

Q. Do you remember the day of this misfortune at Lake Fork?

A. Yes, sir.

Q. How long before that had you been over the road?

A. The day before.

Q. What time in the day?

A. Some time in the forenoon or afternoon; I went up in number one.

Q. State whether you noticed any break, or anything wrong with the road that day?

A. No, sir; I did not notice anything that I considered dangerous.

67 Q. How was the track from Lake Fort for a mile west; in what condition?

A. The track was what we call good average track.

Q. What do you mean by good average track; do you mean a track safe or unsafe?

A. I mean a safe track.

Q. In passing over the road, if you discovered anything that you considered as dangerous on it, what was your duty?

A. To get off and see that it was fixed, or report it to the section foreman.

Q. How long after you discovered it is it your duty to have it fixed?

A. Soon as possible. If it is dangerous, it is my duty to get off and go back and flag.

Q. You were at the wreck.

A. Yes, sir.

Q. How long after it occurred?

A. I got there at nine, or half past nine o'clock.

Q. What did you find to be the cause of this accident?

A. A broken rail.

Q. How much of the rail was broken?

A. About 22 inches.

Q. Did you ever see that piece of rail there?

A. No, sir; not that I recollect of.

Q. Was there more than one rail broken?

68 A. No, sir.

Q. How long before that had you been at that place?

A. It was some few days; I cannot tell exactly the time. I got off and put a pair of fish plates on the same joint.

Q. How long?

A. Ten or fifteen days.

Q. Who was with you?

A. Charles Magnus.

Q. Was that the place where this wreck occurred?

A. Yes, sir.

Q. Tell the jury what you found, and what you did.

A. I found the fish plates broken. Put on good sound plates, and secured them tight. Took a piece of bridge timber 6 x 14, and put it under the joints, and put a wedge on top to make a firm bearing on the timber.

Q. What was your opinion when you got through?

A. I pronounced it safe.

Q. Was it you opinion that it was safe?

A. Yes, sir.

Q. Did you ever see that wedge afterwards?

A. Yes, sir.

Q. When?

A. The day of the wreck.

69 Q. Where was it?

A. The wedge was lying beside the joint; somebody had knocked it down on the ground.

Q. What kind of rail was it?

A. A 24-foot iron rail.

Q. I am asking you about its soundness.

A. It was a sound rail. I did not see any shiver on it. The inside edge might have been cut by the flanges of the wheels.

Q. Did you consider it a good or bad rail?

A. A good rail.

Q. When you got there at the wreck, could [you] discover any cause for the breakage of the rail; if so, state what it was?

A. The cap of the piling was at the end of the bridge solid. The rain made the ground springy, and I thought that the weight of the engine broke the rail.

Q. How long before that had there been a rain?

A. Not more than two or three days. I think it was raining the day of the accident.

Q. You came to the conclusion that the rain had softened the dump and made it more springy than the piling under the
70 bridge, and that caused the engine to break the rail as it passed over?

A. Yes, sir.

Q. How often do you suppose you passed over that track within 15 days before this wreck?

A. Twenty times at least.

Q. Had there been a break in the rail at that point of the size you found there when you got to the wreck, could you have discovered it?

Mr. Sexton. We object,

The Court. I overrule the objection.

Q. If there had been such a break in that rail as you discovered there the morning of the wreck, could or would you have discovered it in passing over?

A. Yes, sir.

Q. Did you examine the break?

A. Yes, sir.

Q. Was it a new or an old fracture?

A. It was new.

Q. Did you notice where the rail was broken with reference to the spikes?

A. No, sir; I did not notice the spikes. The rail was spiked in full on the bridge.

Q. That is, was the rail on the bridge?

A. Yes, sir; the west end of the rail broke; the west end still remained on the bridge.

71 Q. Suppose that that end of the rail had been broken 15 days before this accident, what effect would it have had on trains passing over the road during those 15 days?

A. Don't think a train could have gone over it west.

Q. Would it have been more dangerous east than west?

A. Yes, sir; the pilot or wheels would have struck the end of the bridge; the wheels could not have mounted over.

Q. State whether you discovered there, when you put those fish-plates on the rail, or at any of your subsequent inspections, or at the wreck any visible defect in that rail that would cause it to break.

A. No, sir; I could not see any at all.

Q. Do you know about the force that was on that section at the time?

A. Yes, sir.

Q. What was there?

A. One man—section foreman.

Q. How came the force to dwindle down that way?

Mr. SEXTON: We object; there is no plea about that.

The COURT: I will allow the question.

Q. Why was it?

A. We could not get labor on the section.

Q. What was the reason?

A. Sickness, and better wages elsewhere.

Q. You said there was sickness, what amount?

A. There was hardly a man who went there and staid any
72 length of time without being sick. We could only get negroes a short time at once. The section foreman was there before that. He died the morning before the wreck of malarial fever.

Q. What was his name?

A. Tom Sellers.

Q. How long did he stand it there?

A. About a month.

Q. State what wages you offered for section men.

A. One dollar and twenty cents a day.

Q. What wages did you offer elsewhere on the road?

A. That was the ruling price for section work.

Q. State whether labor was procured elsewhere, at that price, on the road.

A. It was pretty short. A great many of the sections were short of men. Some had two, three, four, five.

Q. In the fall, in October and September, and in the latter part of the summer, in August, how was the condition of the road at that time?

A. In good condition.

Q. When, if ever, did it get out of condition?

A. It was December, January, February, or about that time.

Q. In what condition was the road kept, on that section, up to this accident?

73 A. In very good shape; a pretty good track.

Q. How far does the switch extend the other way from the depot-house at Lake Fork?

A. There is no depot there.
Q. What is it?
A. A switch.
Q. How long is it?
A. The switch is now about 1,600 feet.
Q. How then?
A. About 500 or 600.
Q. How near did it come to the scene of the accident?
A. Something less than half a mile.
Q. What was the condition of the track between what was called Lake Fork station and the scene of this accident?
A. It was good.
Q. You say it is your duty when you discover a track out of fix to have it repaired?
A. Yes, sir.
Q. Suppose you haven't sufficient force to repair it?
A. I take the section foreman myself and go and put in rails.
Q. During the month of October, up to the 6th of November, was the force there sufficient, and did it keep the road in good repair and safe condition?

74 A. There was not force enough to keep it in safe repair; we got the track in good condition from April to July, and had a pretty fair force in August, and September the force was short. It was dry and good weather for track, and it did not run down; there was men enough on the section to pick up low joints, and change out the iron.

Q. Were you ever at that particular point up to the time of the accident?
A. Yes, sir.
Q. In what condition did you find it?
A. In good condition.
Q. Do you know where the section foreman boarded up to this accident?
A. Part of the time at the section house, and part of the time at Lake Fork station; at a party's, I think, by the name of Swindell's.

Cross-examined by Mr. SEXTON:

Question. When you went over the track the day before the accident, you went on the train?
Answer. Yes, sir.
Q. You say you went over the track on the train.
A. Most of the time.
Q. On that day when you had gone over it, day or two before——

75 WITNESS: I think I walked over it five or six days before the accident.

Q. But a day or two before the wreck you did not walk over it?
A. No, sir.

Q. You say you found fish-plates broken some time before this?
A. Yes, sir.
Q. And you put new fish-plates on?
A. Yes, sir.
Q. How far did the fish-plates extend on each side of the joints?
A. About two inches from this back hole.
Q. You say there was but one man on the section?
A. There was a foreman and one laborer.
Q. The section foreman died shortly before the accident?
A. There was a foreman on the section at the time of the accident.
Q. In passing over the track on the train, is it not possible that you might not be able to see a broken rail?
A. I might have passed over one, so that it might have borne the train; if it is well spiked it might hold together.
Q. Are not the facilities better for seeing it if you are walking, or on a velocipede?
A. No, sir.
Q. You say you have been over the road at least once every day.
76 A. Yes, sir; twice.
Q. You considered it good?
A. Yes, sir.
Q. Were there any low joints?
A. Some, but they were not dangerous.
Q. Is it not true that a good deal of the iron was old and worn?
A. Yes, sir; but that bottom was pretty good half a mile each way from the wreck.
Q. I understand you to say that they were paying better wages elsewhere than on that section?
A. Yes, sir.
Q. On this road?
A. Not on repairs, that I heard of.
Q. But if better wages had been offered, do you suppose that hands could have been gotten?
A. They might increase the time, but laborers was in such demand.
Q. Was any offer of higher wages made?
A. No; not at that time.
Q. How did it happen that it got in bad condition after this wreck?
A. By bad weather and continued rain.
Q. Was the force increased any?
A. Yes, sir; all the men they could hire.
Q. At the same price?
A. They increased the wages in March, after the wreck.
77 Q. You say they had a good force on the track in April, May, and June?
A. Yes, sir; five to seven men, putting in ties, &c.

Q. How came the track men to fall off?
A. Hot weather, sickness, work opening up elsewhere, &c.
Q. What was the effect on the track after that?
A. They generally had it repaired where the track got down very bad.
Q. Did it get down at all?
A. Yes, some joints.
Q. At what time was it the force fell off?
A. I think in August or September.
Q. October, too?
A. I think they had three men in October, part of the time, and may be half of September they had three men.
Q. Did not the rains begin to fall about the latter days of Oct.?
A. Somewhere about the first of November.
Q. And at the time of this accident there were but two hands?
A. Yes; one hand and the section foreman.
Q. And that section was how long?
A. Six miles.
Q. I understand you to say that better wages were offered for getting out ties and other work than to laborers?
A. There was better wages offered to men along the line of road on construction.

78 Q. Is it not a fact that construction was going on largely?
A. Yes; all over the country.
A. Was it not on this particular road west?
A. Yes, sir.
Q. Were there not other wrecks on this road near that place about this time?

Mr. TURNER: We object, because we think it is immaterial.
The COURT: I think it is proper on cross-examination.
Mr. TURNER. We except.

Q. Were there any others?
A. I believe a passenger train got off that morning after the wreck at this bridge, east of there.
Q. I understand you to say that you visited the scene of the disaster soon after it occurred?
A. Yes, sir.
Q. And you found the accident was caused by a broken rail?
A. Yes; I pronounced it to be that.
Q. The wrecked cars were there?
A. Yes, sir.
Q. Did you not get there before the other part of the train had left?
A. I did not.
Q. Was the rail broken near the end?
A. Yes, sir.

79 Q. And under that brace you described as having been fixed up?

A. No, sir; it was closer to the bridge than that; right off at the end of the bridge.

Re-direct by Mr. TURNER:

Question. Did you find anything around near there that caused this accident other than the broken rail?

Answer. No, sir.

Q. You were asked if there were not low joints at places; would not that occur on any road they run trains over?

A. I never saw a road that didn't have any.

Q. It would not be necessary to have any section men at all if they did not have to repair them?

A. No, sir.

Q. Were there any low joints there that the force on the road could not have repaired at that time?

A. There were not any on the section that I would not have had repaired; I would have taken men from other sections if they had been dangerous.

Q. Did a low joint anywhere around on that section cause this rail to break?

A. I do not think it did.

80 Q. Did the condition of the road along there, between there and Lake Fork, cause it to break?

A. No, sir.

Q. What effect did the condition of the road, half a mile either way, have on that particular rail?

A. It did not have any effect.

Q. You were asked if they were not constructing pretty largely; they were constructing on the International, Texas Central, and Texas and St. Louis, too, were they not?

A. Yes, sir.

Q. The Missouri Pacific was running to Mineola, wasn't it?

A. I do not think the Missouri Pacific had been started then; think it started in the spring of 1881.

Q. But those other roads were constructed?

A. Yes, sir.

Q. Do you know whether any efforts was made to get hands on that section?

A. I tried to hire men at Mineola, or wherever I could get them.

Q. I understand you to say that [with that] force that section was kept in safe condition?

A. Yes, sir.

Re-cross-examined by Mr. STEDMAN:

Question. You did try to get other hands for this section?

Answer. Yes, sir.

81 Q. What for?

A. For repairs.

Q. It was necessary, therefore?
A. Yes, sir.
Q. What is the reason you did not get them?
A. They did not want to work.
Q. You were not willing to pay them what they asked?
A. I don't know that they set any wages.
Q. Were you not limited in the amount you were authorized to pay?
A. Yes, sir.
Q. You could not go behind that?
A. No, sir.
Q. You were authorized to pay $1.25 a day?
A. Yes, sir.

By Mr. SUMNER:

Q. This amount had been sufficient to get hands before that?
A. Yes, sir; we got hands for $1.10 in Oct.
Q. Repairs are always [needed] on a road, are they not?
A. Yes, sir.
Q. You do not mean by that, to say or indicate there was anything dangerous on this section that needed repair?

Objected to.

Q. What kind of repairs did you want to have done on that section?

82 A. To change iron, raise joints, put in ties, surface track, and do anything that came up; anything pertaining to the section.

Q. You mention among the repairs you wanted to make there, were some low joints, and you wanted to line the track. Did the track at any time on that section get to be dangerous?
A. No, sir; there was no dangerous track on the section previous to this wreck.
Q. You say to repair this particular joint, awhile before this, how many men were necessary to make that repair?
A. Two; one man could have made it as well as two.

83 *Charles Magnus, Sworn and Examined.*

By Mr. TURNER:

Question. Where do you reside?
Answer. In Denton county, Texas.
Q. What is your business?
A. I am a railroad man.
Q. How long have you been working on railroads?
A. The principal part of my time for about 20 years.
Q. What work have you been performing on railroads?
A. Foreman, and working on sections.
Q. How were you employed, and where, in the summer and fall of 1880?

A. The summer and fall I was working on sections.
Q. What sections?
A. Sections 25 and 18, on the T. & P.
Q. Was either one of them Lake Fork section?
A. Yes, sir.
Q. Which one?
A. 18.
Q. At what time you go on 18?
A. In the latter end of September.
Q. What was the condition of the road when you went there?
A. The section was in tolerable good condition.
Q. How long did you remain there.
84 A. I went there the last of September, and was there six days as foreman; I then went back home to my family and then came back and went to work on the section as a hand.
Q. How long did you remain there?
A. From that on up to the time of the wreck; the day before the wreck I was appointed foreman.
Q. How many hands did you have working with you during the month of October?
A. The principal part of the time there were four men and the foreman.
Q. Who were they?
A. Two negroes; one by the name of Ben Wesley, Peter Howard, and a white man; I don't recollect his name; I think he was called "Pete," but I do not recollect his other name.
Q. What was the foreman's name?
A. Allen Sellers.
Q. Where is he now?
A. Dead.
Q. When did he die?
A. Just about the time of the wreck there, either a day or two before or after; I do not exactly recollect.
Q. With the force you had there on that section, in what condition as to safety were you able to keep the road between
85 Lake Fork and a mile west of Lake Fork station?
A. With the force and the weather we were having, we could keep it in very good condition.
Q. How had the weather been that fall?
A. Favorable; it had been dry weather.
Q. And the force you had there with you were able to keep it in good fix?
A. Yes, sir.
Q. Were you at the wreck?
A. Yes, sir.
Q. How long after?
A. I suppose I got there an hour after the wreck.
Q. Did you find what caused it?
A. What I and the others thought caused it.

Q. What conclusion did you come to?

A. I came to the conclusion that it was a broken rail.

Q. Where was the rail that was broken, or was there more than one rail?

A. There were two rails broken the way I looked at it; one rail had been on the bridge; the train had torn the iron out and it was thrown about when I got there, and before that it laid on the bridge; the rail next to it was on the dump, also broken.

Q. Did you ever see that piece of iron? (Pointing to the piece exhibited in court.)

86 A. Yes, sir.

Q. Where did you first see it?

A. I saw it the way it is now the morning after the wreck.

Q. Where was it?

A. At the wreck, at the end of the bridge; that is one of the pieces broken out of the rail.

Q. Did you examine the fracture to see whether it was new or old?

A. It was a new break.

Q. How long after the wreck was it before you put the tag on there?

A. I could not exactly say, but I think it was in the neighborhood of two or three months.

Q. How came you to put it on there?

A. I was ordered to hunt the piece up, and send them to Marshall.

Q. Did you find any other piece?

A. No, sir.

Q. Did you see it in the morning after the break?

A. Yes, sir.

Q. But it had gotten away in the three months.

A. Yes, sir.

Q. Did you ever have anything to do with these particular rails in company with Mr. Horn?

A. Yes, sir.

Q. State what you did?

87 A. Sometime previous to that, as near as I can recollect, about a month, we found the splices broken on the same point.

Q. What do you mean by that?

A. The fish-plates or splices—found them broken, and me and Mr. Horn went to fix it; we put on a new pair of fish-plates, and put a block of bridge timber under the joint to support it.

Q. As a railroad man, what did you think of it after you got through about its safety?

A. I think it was perfectly safe.

Q. What kind of iron was it there; good, bad, or how?

A. It was good iron.

Q. How was the iron generally there, a mile west of Lake Fork, in the bottom?

A. There was some bad iron west of Lake Fork.

Q. How was the iron around this bridge?

A. The iron there was very good.

Q. When you went there to examine it, as to the cause of the wreck, could you discover anything that caused that rail to break; could you see any defect in the rail that caused it to break?

A. No, sir.

Q. Could you see anything in the road-bed on this bridge, or anything of that sort?

88 A. No, sir.

Q. When had you last been over this road?

A. The day before.

Q. What time of the day?

A. In the afternoon.

Q. What were you there for?

A. Me and the negro that was working with me was tightening bolts over the track from Lake Fork switch west.

Q. Do you know whether there was any broken rail at that bridge or not then?

A. There was not.

Q. How often had you been over that road for 15 days previous to this wreck?

A. Nearly every day, and sometimes two, three, or four times.

Q. State whether there was any broken rails there at any time that you examined and passed over the road before this wreck.

A. No, sir.

Q. Were either one of these rails upon the bridge broken previous to the wreck?

A. No, sir.

Q. Taking the breaks as you discovered them that morning after the wreck, what effect, if those rails had been broken that way for 15 days previous, would it have had on the passing trains?

89 A. I think they could not have gotten over it.

Q. Why?

A. The spaces would have been too large for them to jump over, and, besides, the track on the ground would have gone down so low they could not have got on the rail to the bridge.

Q. You say you were over the track the evening before, tightening the bolts?

A. Yes, sir.

Q. How often did you pass over the track for that purpose?

A. I did not pass over very often, but the track-walker passed over it every day.

Q. There was a man in the section for that purpose?

A. Yes, sir; his duty was to examine the track and tighten the bolts every day; there was a man for that purpose up to a few days before the accident.

Q. What became of him?

A. He quit.

Q. Then who performed that duty, if any one?

A. I went over part, and the negro went over at other times; I went over one morning and the other way in the evening, and he would do the same thing.

90 Q. As to examining joints, you mean when you say joints the tightening on the tops of the fish-plates, do you?

A. Yes, sir; on the bolts.

Q. What is this track-walker's duty as to examination of the different joints along the section?

A. To keep the bolts tightened up and to see that everything on the section is safe, and examine the track daily.

Q. In doing this is he required to examine all the bolts or connections, or only part of them?

A. To examine them all as he goes along. I do not know that he stops and looks at every one—he would not have time to do it.

Q. Suppose he found one loose?

A. His duty is to tighten it up.

Q. Suppose he found a rail broken, what is his duty?

A. To fix it so trains could go over and report it to the section foreman, or flag until it is fixed.

Q. While you were section foreman there did you every receive any report concerning those rails?

A. Mr. Horn, the supervisor, told me to watch the fish-plates on them.

Q. Did you do so?

A. Yes, sir. I went there the very day he told me and

91 examined them myself.

Q. I notice this break here—(handling the piece of broke rail)—how far do the fish-plates extend from the break?

A. About two inches back of those holes.

Q. Suppose the piece was broken out entirely, what effect would that have on passing trains?

A. It would jolt it very badly. It would mash the rail down where it struck.

Q. How many trains passed over the road daily while you were on the section?

A. I could not tell exactly, but a good many—six or eight regular trains every day, and a great many extras.

Q. As many as eight trains—that it is on an average?

A. I think there was more.

Q. Suppose that these rails, as you found them the morning of the wreck and in that particular place, had been so for fifteen days, what effect would that have had on passing trains?

A. They could not have gotten over it.

Q. In passing over there and tightening up joints and examining that track are you prepared to say, and I will ask you the

92 question, whether or not that or any other rail in or about that bridge was broken 15 days before this accident?

A. No, sir; it was not.

Q. Was it broken the day before the accident?

A. No, sir.

Q. Did you see every defect in the rail you saw fractured that caused it to break?

A. No, sir. I did not see any defect, only the other rail was a little shivered on the inside edge. That was done by the flange of the wheel, and was no defect.

Q. You say they were good rails?

A. Yes, sir.

Q. And you knew of no reason why they should break?

A. No, sir.

Cross-examined by Mr. SEXTON:

Question. You say it was a good sound rail and perfect?

Answer. Yes, sir.

Q. What made it break?

A. I do not know.

Q. How do you know it was a new fracture?

A. It was a new break.

93 Q. What is the difference between an old and a new break?

A. An old one is generally rusty.

Q. You say you had been over the track every day for 15 days.

A. Yes, sir.

Q. And you are perfectly certain that this breakage had not occurred?

A. Not on the evening previous to the wreck.

Q. Do you say it was impossible not to have seen it?

A. I would have seen it if it was there. It was impossible for me to have over-looked it, I would have seen it.

Q. Do you answer that it was impossible for you not to have seen it?

A. It could not have been broken without my seeing it, because I am well aware that I tightened the bolts on that very joint the evening before.

Q. How many hands were employed on that track?

A. In the month of October, the best part of the time 4 men.

Q. How long had you been at work on the T. and P.?

A. I had been here since 1874.

Q. At work on the road all the time?

A. Not all the time.

Q. You say there were two or three pieces broken?

94 A. No, sir; two bars.

Q. Why didn't you find the other one?

A. I could not.

Q. You found this three months afterwards?

A. I was ordered to send that to the office, about two or three months afterwards.

Q. Where had it been all the time?

A. At the bridge.

Q. You know it is the same piece?

A. I think I am not mistaken about that.

Q. You say you and Horn tightened up the splices?

A. About a month before that.

Q. Where is the other piece that was broken that morning?

A. I do not know.

Q. How long was it?

A. About the length of that.

Q. Did you look at the break that morning, or three months afterwards?

A. That morning.

Q. Where was the other piece broken?

A. About the same piece, broken off the other rail adjoining that.

Q. The west rail?

A. Yes, sir.

Q. West of the bridge?

A. Yes, sir.

Q. This was on the bridge?

A. I do not know whether it was on the bridge or not.

95 Q. Where do you live?

A. In Denton county.

Q. You say you were employed there, first in September?

A. The latter end of September.

Q. And you went home and staid awhile.

A. Yes, a few days, and came back again.

Q. Did not go home any more?

A. I fetched my family to Lake Fork, and lived there.

Q. Do you live there now?

A. No, sir.

Q. In the employ of the road?

A. No, sir.

Q. What are you doing, now?

A. Working on the Missouri Pacific.

Q. Didn't you go away from that section about two weeks before this wreck?

A. No, sir.

Q. Did you not tell John G. Buchanan, in the town of Mineola, in the spring of 1881, that you went away from there two weeks before that wreck occurred?

A. I don't know John G. Buchanan. I did not tell any one that I had gone away from there.

Q. Didn't you tell a conductor on this road, in the town of Longview, in the spring of 1881, that you went away from there two weeks before this accident occurred?

A. No, sir; I did not.

96 Q. Did you not tell him there had not been a section man on that part of the road for two weeks before the accident occurred?

A. No, sir.

Q. Didn't you tell the counsel of Mrs. Pepper, in the city of Dallas, that you had left that section some two weeks before the wreck occurred?

A. No, sir.

Q. Didn't you tell anybody who was representing the interest of Mrs. Pepper that you had left that place two weeks before this wreck occurred?

A. No, sir.

Q. I understood you to say in your direct examination that the section foreman died a day or two before this wreck.

A. Yes, sir.

Q. You were then section foreman.

A. No, sir.

Q. Did not some of the section hands leave there before this wreck occurred?

A. Yes, sir.

Q. How long?

A. I could not say.

Q. Didn't you say it was four or five days?

A. Yes, about that time.

Q. Several days before the wreck occurred there was no one there but you and the negro.

A. Yes.

97 Q. You stated that you and Horn braced up this portion of the track when this breakage occurred some time before; what made you do that?

A. We found the straps broken, and we put on a new pair of fish plates, and, in order to secure it good and solid, we put a piece piece of bridge timber right under the joint.

Q. Was it necessary to do that?

A. We thought it was necessary; it would support it that much better.

Q. The road was not out of repair then.

A. No, sir; only the straps broken. I did not see anything else out of repair.

Q. Tell, if you can, what made this rail break.

A. I do not know. I could not say the cause of it. It was a cold morning, and an iron track.

Q. Was it freezing cold?

A. I think there was a white frost.

Q. Was it freezing?

A. It must have been freezing, if cold enough to have a white frost.

Q. How long after the wreck occurred before you got there?

A. About an hour.
Q. What time of the day?
A. About 7 o'clock.
Q. You cannot say what made the iron break?
98 A. No, sir, I could not.
Q. Do you think it was the cold weather?
A. I think it was.
Q. Is it not true that you are unfriendly to W. G. Kirk?
A. No, sir.
Q. Is it not true that you were discharged from a section and he superseded you?
A. Yes, sir, but I never had any hard feelings towards Mr. Kirk.

E. B. Smith, Sworn and Examined.

By Mr. TURNER:

Question. What is your business?
Answer. Engineer on the T. & P. Railway.
Q. How long have you been running an engine?
A. Eight years.
Q. How long on the T. & P.?
A. I mean on this road—ten years altogether.
Q. Where were you running in October and November, 1880?
A. On the T. & P.
Q. What run did you have?
A. Between here and Weatherford.
Q. What kind of a train?
99 A. Passenger.
Q. How often did you make a trip over the road?
A. I made a round trip once every three days.
Q. That carried you twice over the road?
A. Yes, sir.
Q. You were pulling the train when Mr. Kirk was killed?
A. Yes, sir.
Q. What was the number of your engine?
A. 47 or 48; both are alike; I am most positive it was the 47.
Q. About what time of the day did the accident occur?
A. A little after six o'clock in the morning.
Q. Was it before or after day?
A. After day—not a great while after daylight.
Q. Do you know what caused your train to get off there that morning?
A. I suppose it was a broken rail.
Q. When did you pass over that place, previous to this accident?
A. The evening before the wreck, about 6 o'clock, I think.
Q. In passing over the place where you say there was a broken rail, did you discover any broken rail as you went up?
A. No, sir.

Q. When did you first discover anything the matter there, and how?

100 A. I felt a jar on the engine, and I thought there was something wrong, and I just stopped soon as I could. The engine and two or three cars passed over it, besides the engine and tender, and the other two went off.

Q. You felt a jar as the engine passed over?

A. Yes, sir.

Q. How far was that from Lake Fork station?

A. Pretty near half a mile.

Q. How far do you sound your whistle from stations?

A. Half a mile, as a general thing.

Q. Did you sound the whistle that morning?

A. Yes; had just about sounded.

Q. You say you passed over that place about three trips a week?

A. Yes, sir.

A. That would carry you over the road five or six times?

A. I only made a half trip then.

Q. How far up did you go?

A. About four miles this side of Will's Point, and then turned back.

Q. Did you discover anything at this point the matter with the rail as you went up?

A. No, sir.

Q. Did you ever discover anything, while your train was passing that point, to be the matter with the rail?

A. Not at that particular place.

101 Q. How does a broken rail effect an engine as it passes over it?

A. It jars.

Q. Can an engineer tell it as he passes over it?

A. I think so, if it is any ways loose.

Q. Suppose a piece was broken and gone, how would that affect his engine?

A. It would cause a very hard jar, and he would stand a pretty good chance of getting off the track.

Q. How far can you see ahead in iront of your engine as to condition of the track—see a broken place in front of your engine?

A. I would say a quarter of a mile. I don't know that I ever measured it?

Q. Who was on the outlook, if anybody, on your engine that day?

A. The fireman was there, besides myself.

Q. Did you discover anything the matter with the track as you approached this place?

A. It was on the fireman's side.

Q. Did you see anything the matter with the track?

A. No, sir.

Q. If a piece as large as that piece lying on the table there had

been out of the rail, could you have seen it from your engine as you approached it?

A. I think I could.

102 Q. Have you any doubt about it?

A. I am positive I could have seen it if I had been looking ahead.

Q. Could you feel it going over on your engine?

A. I could.

Q. Considering the number of times you have passed over it, and what you say as to feeling of your engine in passing over there, what is your best opinion as to the condition of the track; whether that rail was broken the evening previous or not?

A. It might have been broken in there, but it was not gone; the rail was there.

Q. What is your best judgment?

A. I do not think it was broken.

Q. It is possible that it might have been broken, but you did not think it was.

A. No, sir.

Q. And as you came back next morning there was a jar?

A. Yes, sir.

Q. When, in your judgment, was the rail broken?

A. I think the engine I was running broke it the morning of the accident.

Q. What was the condition of the track within a mile of Lake Fork on the west?

A. I would call it a fair track; the track was safe.

103 Cross-examined by Mr. SEXTON:

Question. You were the engineer?

Answer. Yes, sir.

Q. You occupy the right-hand side?

A. Yes, sir.

Q. The fireman the left?

A. Yes, sir.

Q. It is customary for the engineer to look for the right rail and the fireman the left?

A. No, sir; the engineer is supposed to keep a lookout on both sides; the fireman is supposed to look after anything wrong.

Q. Besides looking at the track, the engineer has to look at the engine?

A. Yes, sir.

Q. Did I understand you to say if this piece of iron had been on the track, and broken, you could have passed over it without observing it, if the fish-plates were fastened?

A. It is possible I might not have noticed it.

Q. A train could have passed over it without any material damage?

A. Yes, if the fish-plates were on; it would be very apt to jar it out if many trains passed over it.

Q. This accident occurred after daylight?

104 A. Yes, sir.

Q. I understand you to say that your engine broke the rail?

A. Yes; account of the break being new; it looked to me like a new break.

Q. What caused it do you think?

A. I do not know what caused it.

Q. If the west rail connected with this, west of the bridge, had been slightly sunk down from this, and your engine had gone upon it, what effect would that have had, if the rail had not been broken?

A. If down a little it might probably not do any hurt.

Q. But suppose it had been considerably down?

A. The pilot would have caught it.

Q. Suppose the rail had been broken when your engine went on it?

A. If the rail was broken and all fastened with fish-plates, it was possible for the engine to go over.

Re-direct by Mr. TURNER:

Question. Not many would go over it?

Answer. I think not.

Q. Do you know how many trains ran over the road per day at that time?

A. There was one passenger each way; I do not know how

105 many freights; 8 or 10 freights each way, besides the passenger; at that time the road was doing a good business.

Q. How long do you think it would take to jar it out with that number of trains passing over the road?

A. I do not know.

Q. Give me your best judgment; would it stay there 15 days?

A. No, sir.

106 *J. M. McGraw, Sworn and Examined.*

By Mr. TURNER:

Question. What is your occupation?

Answer. Locomotive engineer.

Q. How long have you been running an engine?

A. About sixteen years.

Q. How long on the T. & P.?

A. About 9 years.

Q. Do you run passenger or freight?

A. Passenger.

Q. What run did you have?

A. Number two and four.

Q. Between what points?

A. Between here and Fort Worth.

Q. That passes Lake Fork?

A. Yes, sir.

Q. In the month of October, the latter part, and up to the 6th of November, of 1880, how often did you pass over the road per week?

A. About six times.

Q. Do you remember the bridge about half a mile west from Lake Fort station?

A. Yes, sir.

Q. You say you passed over that six times a week?

A. Yes, sir; I went over it on the 4th.

Q. Did you discover anything there to indicate unsafe condition of the track?

107 A. No, sir.

Q. What was the condition of the road around there?

A. Very good there.

Q. Did you consider it safe or unsafe?

A. I considered it safe.

Q. Were you at that wreck at any time?

A. No, sir; I came back the next night.

Q. You do not know from your own knowledge what caused it?

A. Only what they told.

Q. What effect does it have on you in the cab of an engine passing over a broken rail?

A. Liable to jar me considerably.

Q. Can you, or can you not, tell when an engine passes over a broken rail?

A. Yes, sir; I feel it.

Q. If there had been at Lake Fork station on the evening of the 4th, when you passed there, a rail broken as you see that one before you there, at the west end of that bridge, what is your judgment about whether you would or would not have felt?

A. I would have felt it; it would have been liable to throw me off the track.

Q. What time did you come back?

A. In the night.

Q. Did you notice anything there to indicate a broken rail?

A. No, sir.

108 Q. What is your opinion about the condition of that track?

A. It was very good.

Q. Safe or unsafe?

A. Safe.

Cross-examined by Mr. SEXTON:

Question. Was not that track along from Lake Fork station to the river rough track?

Answer. I thought it was about as good as any.

Q. I speak of it as to whether it was first-class?

A. I don't know that I would call it a first-class track; it was good, ordinary track. A man could run over it safe.

By Mr. TURNER:

Q. You did not consider it up to the standard of the New York Central?

A. No, sir.

By Mr. SEXTON:

Q. What average did you make?

A. About twenty miles.

By Mr. TURNER:

Q. You were asked if this was a first-class track; did you ever see any in the Western country?

A. I have never see any in Texas.

Q. You mean it is not as good as a stone ballasted road?

109 A. Not as good as an Eastern road, but a good, safe track. I have made 20 miles an hour over it.

By Mr. SEXTON:

Q. Your opinion is regulated by the standard of roads in Texas?

A. Yes, sir.

Q. You say you could not call it first-class in comparison with Eastern roads?

A. I could not say that I could.

Q. Were you connected with the International when it was first built?

A. I have never been over it but once, and that quite awhile after it was built. I was then a very good track.

Q. If a rail was broken without being missing, as you have heard in all this testimony, could an engine pass over it?

A. She might, and then again she might throw it out.

E. B. Smith Recalled.

By Mr. SEXTON:

Question. You were running that train that morning?

Answer. Yes, sir.

Q. Did it not get off the track a short distance after you started again?

A. Yes, sir.

110 *Briscoe C. Young, Sworn and Examined.*

By Mr. TURNER:

Question. How are you employed?

Answer. On the T. and P. Railway.

Q. What to do?

A. Porter on the train.

Q. What conductor did you run with?

A. Capt. Taylor.

Q. Were you on the train on the 6th of November, when they ran off at Lake Fork?

A. Yes, sir.

Q. What time in the morning was it?

A. About sun up; about 6 o'clock.

Q. What part of the train got off?

A. First-class coach and sleeper.

Q. How many cars passed over?

A. Three; two second-class coaches and baggage-car.

Q. What car were you in?

A. Second class.

Q. At what time did you discover anything wrong?

A. As soon as second-class coach went over; I felt the jar.

Q. You felt it as you passed over?

A. Yes, sir.

Q. Did you go out and see what was the matter?

A. Yes, sir; I got up and ran to the door, and saw that
111 the other coaches were gone; the engineer stopped within 200 or 300 feet.

Q. What did you find to be the cause?

A. I thought the engine went over the rail and broke it.

Q. Did you see the pieces?

A. Yes, sir; I looked at them.

Q. What kind of a break?

A. It was a new one.

Q. Tell us what the appearance of the break was.

A. There were a couple of pieces of rail broken out; one of them was a foot long and the other about the same.

Q. State where it was broken.

A. One part of the rail was on the bridge, and one projected over the embankment.

Q. You said it looked like a new break; tell the jury how it looked.

A. It looked as if you broke a piece of iron off; the rail seem to be solid; there did not seem to be any rust.

Q. You found Capt. Taylor back there?

A. Yes, sir.

Q. What condition was he in?

A. He was bleeding.

Q. What kind of a morning was this?

A. It was a clear, sunshiny morning, a little cold; had rained
112 during the night; we had a wreck between Will's Point and Edgewood, and we ran backward to Mineola, and we got there about daybreak.

Q. What I mean, was it cold or not?

A. It was cold; I think it was frosty; I know it was; I put my hand on the rail, and it was cold enough for my fingers to stick to it.

Q. When had you passed over that road before?

A. I think the night before that.
Q. You had passed over about the 4th?
A. Yes, sir.
Q. Did you discover any break there?
A. No, sir; it seemed to be a good track along there.
Q. Something has been said about a train getting off a second time; do you know anything about that?
A. Yes, sir.
Q. Where did it occur?
A. About a quarter of a mile this side of the Lake Fork, between section house and side track.
Q. What was the matter there?
A. We broke a rail there.
Q. How many pieces was it broken into?
A. Three.
Q. How long had you been running on the train before that?
A. For five or six years.
113 Q. When did you break any rails previous to that time?
A. Several of them, in the last four or five years.
Q. When was the last time before this you had broken on a track?
A. I do not remember; I could not tell; I never took any particular notice; if we broke one, we stopped and went back to the section house, or took some other measure about it.

We agree that the foregoing contains all the testimony introduced on the trial of the above-entitled cause.

June 28, 1882.

W. & N. A. STEDMAN,
F. B. SEXTON,
Att'ys for Plaintiff.
TURNER AND STUART,
Att'ys for Def'd't.

114 *W. H. Taylor Re-called.*

By Mr. TURNER:

Question. Something has been said about that wreck near Willi's Point; state what caused that wreck, and what it was:

Answer. Cotton fell off into the cut; I transferred there, and saw the cotton in the cut.

By Mr. SEXTON:

Q. I understand you to say you do not know anything, of your own knowledge?
A. No, sir; but I saw the cotton in the cut.
Q. Did not you say your train got off again?
A. Yes, sir.
Q. What got it off?
A. A rail. The engine broke a rail.

I approve the foregoing as a correct statement of all the facts

given in evidence on the trial of this cause, this the 29th day of June, A. D. 1882.

H. J. BOOTY,
Judge 2d Judicial District.

115 *Charge of the Court. Filed May* 29, 1882.

LAURA and G. A. KIRK
vs.
TEXAS AND PACIFIC RAILWAY COMPANY. } 6993.

GENTLEMEN OF THE JURY: This suit was brought on the 23d of March, 1881, by Laura and George Anna Kirk. Since the commencement of the suit, the plaintiff, George Anna, has departed this life, and as to her interest in this action, the suit has abated, and the suit is now on action by the said Laura alone, against the Texas and Pacific Railway Company.

The plaintiff, Laura Kirk, alleges that William Garth Kirk, deceased, was her husband, and that on the 6th day of November, 1880, he was traveling as a passenger on one of defendant's passenger trains of cars from the town of Mineola, in Wood county, Texas, to the town of Marshall, in Harrison county, Texas, and that he was was considered, treated, and recognized as a passenger by the conductor in charge of said train, and that on the said trip from Mineola eastward, in the direction of Marshall, at a point a short dis-
116 tance west of Lake Fork station the car in which the said William Garth Kirk was traveling was, through the gross and criminal carelessness and negligence of defendant, its agents, and servants, and while the same was moving at a rapid rate of speed [was] thrown from the track of said railway violently down an embankment; the said car crushed, and that thereby the said William Garth Kirk was severely wounded and injured, and that in less than thirty-six hours hours thereafter he, the said William Garth, in the city of Marshall, died from said wounds and injuries, and that the immediate cause which operated to throw said train, including the car in which the deceased was traveling from the said railroad track was a broken rail, a large piece of which she alleges was missing from said track; and she further alleges that the defendant and its agents and servants knew, or by ordinary care and diligence might have known, that said railway track was so out of repairs, and that at the said place at which said accident occurred, and in the vicinity thereof, defendant's railway track was, and for a long time prior thereto, had been grossly, carelessly, and criminally out of
117 repair. And she further avers that the death of her said husband was brought about [by] the gross carelessness and negligence of defendant, its agents and servants, and she brings this suit for damages sustained by her by reason of his death.

The defendant denies the allegations of the plaintiff, and says that the accident which caused the death of Kirk was caused by no fault or want of care on the part of the defendant; that said road

and track were in apparent good order and condition without visible defects in the same; that at the place of said accident said track but a few days before had been carefully inspected by the agent of defendant authorized to inspect the same, and was found to be in good and safe condition, and that the very rail which was broken was particularly examined and found to have no defect which said agent could discover; that when its track needed repairs the same were properly and safely made; that said accident occurred from a certain cold spell which caused the iron rails on said track to suddenly contract, and thereby render them more
118 liable to break when trains passed over them; that the defendant employs competent and skillful agents to purchase its iron for its track, and that the rails on said track, including the one alleged by plaintiff to have been broken, were good, strong, safe rails, of the most approved fashion.

When a railroad company receives a passenger on its cars to be transported from one place to another its contract is that it will carry him safely as far as human care, skill, and foresight will enable it to do so; and it is under the same obligation to give safe transportation to a free passenger as to one from whom it receives fare; and, if it appears from the evidence in this cause that the deceased, William Garth Kirk, was received on the train on which he traveled by the conductor on said train, and respected and recognized as a person whom the defendant was under obligation to transport, then it owed to him the same degree of care as if he had paid his passage money.

A railroad company is bound to lay its track and road-bed in such a manner, and to keep them in such a condition, as to make the road safe for the use of its passengers; and to this end
119 the iron rails on which the cars travel should be good, sound, and substantial, and such as to make it safe for passengers to travel over its road. A railroad company is not an insurer of the safety of ts passengers. But it is bound to provide for their safety as far as human care and foresight will go towards making provision for their safety. The failure of a railroad company, therefore, to provide sound and substantial iron upon its road is culpable negligence, for which any passenger, injured by its failure to provide them, is entitled to recover damages; and if the passenger, if living, might recover damages, then the person or persons having an interest in his life, or injured by his death, may recover for the destruction of his life.

If, then, you believe, from the evidence before you, that the plaintiff, Laura, is the surviving wife of William Garth Kirk, deceased, and that about the 6th day of November, 1880, the deceased was traveling as a passenger on defendant's train, as alleged in the petition of plaintiff, and that at or near the place in said petition designated the car in which he was traveling, was by means
120 of a broken rail thrown from the track, and that by reason thereof the deceased was injured, and that from said injuries

the said William Garth soon after died, then, *prima facie*, the plaintiff is entitled to recover; and, if you so believe, you will find for for her, unless you find for the defendant under the instructions given you hereinafter.

You are further instructed that if you believe from the evidence that the rail which broke and caused the accident complained of (if it was so caused) was to all appearances sound, safe, and substantial, and that the defect therein (if any existed) was one that the greatest care and the most careful inspection could not have discovered, then the injury to the deceased is a mere misfortune for which he could recover nothing if living, and for which the plaintiff cannot recover, now that he is dead, unless you believe from the evidence that said rail had been broken a length of time prior to said accident, such as should have enabled the defendant, its agents, and servants, by the exercise of the greatest care, skill, and
121 foresight to have discovered the same, and to have replaced said rail with a sound one, or otherwise repaired it as to be safe for passenger trains to travel over, and if you so believe, then you will find for the plaintiff.

If the said rail was to all appearances good, safe and substantial, and was by the effect of a sudden cold spell of weather caused to break by the passage over it of the train on which the deceased was traveling, or through the effect of a cold spell of weather caused to break by the passage over it of another train before the one on which the deceased was traveling, and there did not intervene sufficient time between the breaking of said rail and the accident by which the deceased was injured to have enabled the agents of the defendant to have discovered the broken condition of said rail, they using due care and prudence on their part, then the injuries to the deceased is a mere misfortune for which the plaintiff cannot recover.

When an injury is caused to a passenger by the breaking
122 of a rail on a railroad track, then *prima facie* the rail is defective, and in order to avoid recovery for an injury resulting therefrom, it devolves on the railroad to show such facts as to show the railroad to be without fault and that the injury resulted from some cause other than the want of due care and foresight on the part of the railroad company.

If you find for the plaintiff, you will find for her the pecuniary injury resulting to her from the death of the deceased. Nothing can be recovered by her for the personal, mental, and physical suffering of the deceased, or for her own mental suffering.

The damage to her (if she be entitled to any) are purely pecuniary, and in estimating these damages much must be left to the good sense and sound judgment of the jury, and in this connection they may consider the exact situation, annual earnings, habits, health, and estate of the deceased, the profits of his labor and business, what he would have earned for the support of the plaintiff, and the probable or reasonable expectation of the life of the de-

ceased, which may be determined by the Carlisle table, or
123 other tables recognized scientific accuracy relating to the expectation of human life.

You are further instructed that if you find for the plaintiff any sum or actual damages, then you may look to the evidence before, and the instructions given you hereinafter, and determine whether or not she be also entitled to vindictive or exemplary damages.

Actual damages are the compensation given to an injured plaintiff, and compensation means pecuniary compensation.

Vindictive or exemplary damages are given (if given at all) not for the purpose of compensating the injured plaintiff for the loss sustained, but as a punishment to the person or corporation liable to damages, and as a warning to others to refrain from being guilty of a similar wrongful act, or failure of or neglect of duty.

In order to be liable for exemplary damages the defendant, its agents and servants, must have been guilty of such a degree of gross negligence as manifests that entire want of care which would raise a presumption of a conscious indifference to consequences.
124 Indifference of this kind, and to this degree, is morally criminal, and if it leads to actual injury, will be regarded as criminal in law, and no degree [of] negligence less than that degree of gross negligence last above mentioned will authorize you to find for the plaintiff exemplary damages; and unless it appears from the evidence that the defendant has been guilty of gross negligence to the extent above described, you will refrain from finding any sum for exemplary damages.

If you find for the plaintiff any sum as actual damages you will so say in a verdict in the following form:

We, the jury, find for the plaintiff —— dollars as actual damages, and if you also find for her any sum as exemplary damages, you will add to your verdict the following:

We also find for the plaintiff —— dollars as exemplary damages.

If you think there is conflict in the testimony of the witnesses, you will, if you can so reconcile the said conflict as to give credit to the whole of the testimony, but if you cannot do this, then you will credit or discredit the whole or any part of the testi-
125 mony of any witness who has testified in the cause, according as your minds may be impressed, that his testimony is or is not worthy of belief, and your verdict, in case of conflict in the evidence, will be in favor of that party in whose favor there is the preponderance or greater weight of evidence.

If you find for the plaintiff exemplary damages, you will find such sum as is in your opinion a proper chastisement to the defendant for its wrongful act or omission, and also such sum as will constitute a proper warning to others to prevent the repetition of such wrongful act or omission. If you find for the plaintiff, you will in no event find a sum beyond that claimed by her in her petition—that is, the actual damage found by you (if you find any) cannot ex-

ceed the sum of actual damages claimed by her; and so as to exemplary damages also.

A. J. BOOTY, *Judge.*

File. Charge of the court. Filed May the 29th, 1882. Alex. S. Field, clerk D. C., H. Co., Texas.

126 *Special Instruction asked by Def't. Filed May 29th*, 1882.

LAURA KIRK
vs.
TEXAS PACIFIC RAILWAY COMPANY.

Now comes defendant in the above-entitled cause, and asks the court to give the following instructions to the jury:

1st. You are instructed that the plaintiff's proof must correspond with the allegations of the petition, and you are instructed that if the accident in this case was caused by a broken rail, a part of which was missing, and that said broken and missing rail was caused by the negligence of defendant, then you will find for the defendant, otherwise not.

2d. You are instructed that the plaintiff charges that the accident which occurred in this case was caused by a broken rail, three feet of which had been missing for some time previous to the accident.

Now if you find that said facts existed as charged in said petition, and that they existed by reason of the carelessness and negligence of defendant, then you will find for plaintiff, otherwise you will not.

127 3d. You are instructed that if you believe from the evidence that William Garth Kirk was an employee of the defendant at the time of said alleged injury, and traveling as such, then you are instructed that the defendant, as to him, was held only to the use of ordinary care in the maintenance of its track and road-bed.

4th. You are instructed that in this case plaintiff can have no recovery for exemplary damages, unless the defendant either willfully or maliciously injured the said Kirk, or under all the circumstances in the case, was guilty of such gross and culpable negligence as would amount to a reckless disregard of civil obligation.

5th. You are instructed that the defendant is liable only for those defects in its track which could be discovered by careful inspection and scrutiny, and if you believe from the evidence in this case that the defect which caused the rail to break was a latent defect which could not be discovered by careful inspection and scrutiny, and by the application of ordinary tests, then the defendant is not answerable for said defect, and the plaintiff cannot recover.

128 6th. You are instructed that the defendant is not liable for latent defects in its track which cannot be discovered by

the application of tests, and which cannot be found by careful scrutiny and inspection.

TURNER & STUART,
Att'ys for Def'd't.

7th. You are instructed that if said William Garth Kirk was an employee of the defendant at the time of said accident, and was engaged as stock and fuel agent by said defendant, and if you find that his duties compelled him to ride upon all trains of the defendant frequently, and at all hours, you are instructed that he was a fellow servant with the section hands and conductors and brakemen on said road, and you are instructed that one servant cannot recover damages against his employer for injury received by reason of the negligence at his fellow servants.

8th. You are instructed that it said rail broke by reason of the cold weather, or from any cause over which defendant had no control, and could not foresee, then you will find for defendant.

TURNER & STUART.

129 KIRK *vs.* T. AND P. RAILROAD COMPANY.

Def'd't asks the following special charges:

8th. The plaintiff charges that the accident in this case was caused by a broken rail, and that said rail had been broken a long time previous, and that the defendant suffered it to remain so broken up to the time of the accident, and that this was negligence which caused the injury. Now if the cause of the injury was a broken rail that was so allowed to remain broken as charged, and that it was negligence to permit it to remain in the track, then you will find for the plaintiff, but if the injury was not caused by the negligence as alleged in the petition, you will find for the defendant.

9th. The actual damage of plaintiff is not the sum her husband might have earned, measured by his earnings at the time of his death, but is the pecuniary interest that the plaintiff had in the deceased. She, if entitled to anything, would be entitled to a sum sufficient to insure her support and maintenance, and no more.

130 10th. The defendant is not an insurer of the lives of persons traveling on its trains, but is held to the higest degree of care in providing and keeping its railway in proper and safe condition, but if from some hidden defect in the iron rails, which could not have been discovered by a careful inspection of the rail, caused it to break, then the defendant would not be liable therefor.

11th. If the accident was caused by a rail breaking under the engine and cars of the train, and if the rail was to all appearances a sound and good rail, and if safe to all appearances, and if said rail and its support and fastenings had been recently examined by persons employed by the defendant for that purpose, and if such persons pronounced the rail to be safe and sound, and it was so to all appearance, then the defendant would not be liable.

12th. In civil case juries are to be controlled by the preponderance of evidence.

13th. If the accident was caused be any other means or in any other way than charged in the petition, you must find for the defendant.

TURNER & STUART,
Att'ys for Def'd't.

131 The foregoing instructions were asked by the defendant on the trial of this cause, and refused by the court, and the clerk will file the same as part of the record in this cause.

A. J. BOOTY, *Judge.*

File. Special instructions asked by the defendant. Filed May 29th, 1882. Alex. S. Field, clerk D. C. H. Co., Texas.

Judgment.

LAURA and G. A. KIRK
vs.
THE TEXAS PACIFIC RAILWAY COMPANY. } No. 6993.

This cause coming on for trial on this the 29th day of May, A. D. 1882, and the counsel for the plaintiffs having suggested the death of George Anna Kirk, one of the plaintiffs, it is ordered by the court, that this suit abate as to said George Anna Kirk, and that the same be henceforward prosecuted for the sole use and benfit of the plaintiff, Laura Kirk, and both sides appearing
132 by attorney, and announcing ready for trial, there came a jury of good and lawful men, to wit:

L. W. Lloyd, foreman, and eleven others, and the jury having been duly tried, impanneled, and sworn, according to law, to try this cause, and having heard the evidence and argument of counsel, and having received the charge of the court, retired to consider of their verdict; and after an absence of a few hours the jury returned into open court the following verdict, to wit: "We, the jury, find for the plaintiff, Laura Kirk, twelve thousand and five hundred dollars as actual damages. L. W. Lloyd, foreman of the jury."

It is therefore ordered and considered by the court that the plaintiff, Laura Kirk, have and recover of the defendant, The Texas and Pacific Railway Company, said sum of twelve thousand five hundred dollars, together with all costs herein expended, for all of which let execution issue.

133 *Motion for a New Trial. Filed May 31st*, 1882.

District Court. Spring Term, 1881.

LAURA KIRK *vs.* THE TEXAS PACIFIC RAILWAY COMPANY.

Now comes the defendant in the above cause and moves the court to grant it a new trial for the following reasons, to wit:

1st. Because the court erred in overruling defendant's petition for removal to the U. S. Federal court at Jefferson.

2d. Because the verdict was not sustained by the evidence, and because it is against the weight of the testimony.

3d. Because the court erred in not giving any and all of the special charges asked for by the defendant.

4th. Because the court erred in its charge to the jury in that it charged negligence as a matter of law, in charging the jury what would constitute culpable negligence on the part of defendant.

5th. Because the court erred in not charging the jury that the degree of care to be exercised by the defendant toward an
134 employee, riding upon a free pass, was different and less strict than that to be exercised toward a regular passenger paying fare.

6th. Because the court did not charge the jury that the proof must correspond with the allegations of the plaintiffs' petition, and because the court did not charge that the plaintiff, having based her cause of action upon a missing rail, could recover only on proof of same.

7th. Because the court allowed proof as to the general condition of the road, the same being incompetent and immaterial and prejudicial to the rights of defendant.

8th. Because the witnesses Swindle and White were allowed to testify as experts when they had not qualified as such.

9th. Because the charge of the court is not clear and explicit, and calculated to mislead the jury.

10th. Because the verdict of the jury is excessive in amount and not warranted by a preponderance of evidence.

TURNER & STUART,
Att'ys for Def'd't.

[Endorsed:] Motion for new trial. Filed May 31st, 1882. Alex. S. Field, clerk D. C., H. Co. J. B. Lewis, deputy.

135 *Order on Motion for New Trial.*

District Court. June 2d, 1882.

LAURA KIRK
vs. } 6993.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

In this case the motion of the defendant, The Texas and Pacific Railway Company, for a new trial, coming on to be heard, and the parties appearing in open court by their attorneys, and the said motion being by the court considered, it is therefore ordered by the court that the said motion be, and the same is hereby, overruled, to which ruling the defendants excepts and gives notice of an appeal to the supreme court of State of Texas.

No. 1 Bill of Exceptions. Filed May 29th, 1882.

In District Court, Harrison Co. Spring Term, 1882.

LAURA A. KIRK *vs.* THE TEXAS AND PACIFIC RAILWAY COMPANY.

Be it remembered that on a trial of the above cause the defendant presented special charges to the court to be submitted to the jury, numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, which the court rejected, and to which the defendant excepted, and tenders
136 this bill of exceptions and asks that the same be made a part of the record in this case.

Approved: A. J. BOOTY, *Judge.*

Bill of exceptions No. 1. Filed May 29th, A. D. 1882. A. S. Field, clerk D. C., H. Co., Texas.

No. 2 Bill of Exceptions. Filed May 29th, 1882.

In District Court, Harrison County, Texas. Spring Term, 1882.

LAURA KIRK *vs.* THE TEXAS AND PACIFIC RAILWAY COMPANY.

Be it remembered that on the trial of the above cause the defendant, on the fifth of May, 1881, filed its petition and bond for the removal of this cause for trial to the U. S. circuit court at Jefferson, Texas, which motion to remove was by the court overruled, to which ruling defendant excepted, and tenders this bill of exceptions, and asks that the same be made a part of the record of this case, which is done.

Approved: A. J. BOOTY, *Judge.*

File. Bill of exceptions No. 2. Filed May 29th, 1882. Alex. S. Field, clerk D. C.

137 *Bill of Exceptions No. 3. Filed May 29th*, 1882.

District Court, Harrison County, Texas. Spring Term, 1882.

LAURA KIRK *vs.* THE TEXAS AND PACIFIC R'Y CO.

Be it remembered that after the verdict of the jury defendant in the above moved the court to grant it a new trial, for the reasons stated in the motion, (see record,) which motion was by the court overruled, to which ruling defendant excepted, and tenders this bill of exceptions, and asks that the same be made a part of the record in this cause, which is accordingly done.

Approved: A. J. BOOTY, *Judge.*

File. Bill of exceptions No. 3. Filed May 29th, 1882. Alex. S. Field, clerk D. C., H. Co., Tex.

Bill of Exception No. 4. Filed May 29, 1882.

STATE OF TEXAS, *Harrison County, Tex.:*

District Court. Spring Term, 1882.

Be it remembered that on a trial of the above cause defendant presented its general and special demurrers to plaintiff's petition, which were by the court overruled, to which ruling defendant excepted and tenders this bill of exceptions, and asks that the
138 same be made a part of the record in this case, which is done.

Approved: A. J. BOOTY, *Judge.*

File. Bill of exceptions, No. 4. Filed May 29th, 1882. Alex. S. Field, cl'k D. C., H. Co., Tex.

Bill of Exceptions No 5. Filed May 29th, 1882.

In the District Court, Harrison County. Spring Term, 1882.

LAURA KIRK
vs. } 6993.
TEXAS AND PACIFIC RAILWAY COMPANY.

Be it remembered that on the trial of the above entitled cause, the plaintiff offered to prove by witnesses White and Swindle the general condition of defendant's road and road-bed on the sections where the wreck occurred, between Mineola and Lake Fork, to which defendant objected, because the same was immaterial and irrelevant, which objection the court overruled, and the defendant excepted to said ruling, and herewith tenders this bill of exceptions, and asks that the same be made a part of the record of this cause, which is accordingly done.

Approved: A. J. BOOTY, *Judge.*

File. Bill of exception No. 5. Filed May 29th, 1882. Alex. S. Field, clerk D. C., H. Co., Texas.

139 *Bill of Exceptions No. 6. May 29, 1882.*

District Court, Harrison County, Texas. Spring Term, 1882.

LAURA KIRK
vs. } 6993.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Be it remembered that on the trial of the above cause plaintiff offered to prove by witness Horn that about the time of the accident in question other wrecks occurred on the defendant's road near the place where the wreck in question occurred, which was objected to by the defendant, because the same was irrelevant and immaterial, but which objection the court overruled, to which ruling the defendant excepted, and tenders this bill of exceptions, and asks that the same be made a part of the record in this cause, which is done.

I approve the forgoing, stating that it was on cross-examination, and after the witness had testified on direct examination to the good condition of the road.

A. J. BOOTY, *Judge.*

File. Bill of exceptions No. 6. Filed May 29, 1882. Alex. S. Field, clerk D. C., H. Co., Texas.

140 *Appeal Bond. Filed July 12th*, 1882.

LAURA KIRK
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY. } 6993.

Whereas, on the 29th day of May, 1882, Laura Kirk recovered before A. J. Booty, judge of the 2d judicial district of Texas, in the district court of Harrison county, Texas, the following judgment, to wit:

LAURA KIRK
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY. } 6993.

This cause coming on for trial on the 29th day of May, 1882, and the counsel for the plaintiffs having suggested the death of George Anna Kirk, one of the plaintiffs, it is ordered by the court that this suit abate as to said George Anna Kirk, and that the same be henceforward prosecuted for the sole use and benefit of the plaintiff, Laura Kirk, and both sides appearing by attorney, and announcing ready for trial their cause, a jury of good and lawful men, to wit, L. W. Lloyd and eleven others, and the jury having been duly impanneled, tried, and sworn, according to law, to try this cause, and having heard the evidence and argument of counsel, and
141 having received the charge of the court, retired to consider of their verdict, and after an absence of a few hours the jury returned into open court the following verdict, to wit: "We, the jury, find for the plaintiff, Laura Kirk, twelve thousand five hundred dollars as actual damages. L. W. Lloyd, foreman of the jury."

It is therefore ordered and considered by the court that the plaintiff, Laura Kirk, have and recover of the defendant, The Texas and Pacific Railway Company, said sum of twelve thousand five hundred dollars, together with all costs herein expended, for all which let execution issue, to all which defendant excepts, and gives notice of appeal to the supreme court of Texas. And defendant, having filed its motion for a new trial, and the same being by the court overruled, and defendant having given notice of appeal in open court, it has appealed this case to the supreme court of Texas.

Now, therefore, we, The Texas and Pacific Railway Company, as principal, and ———, as sureties, acknowledge ourselves bound to pay to Laura Kirk the sum of twenty-six thousand dollars, conditional that the Texas and Pacific Railway Company, appel-
142 lant, shall prosecute its appeal with effect, and in case the

judgment of the supreme court shall be against it, that it shall perform its judgment, sentence, or decree, and pay all such damages as said court may award against it.

Witness our hands, this the 12th day of July, A. D. 1882.

THE TEXAS AND PACIFIC RAILWAY COMPANY.
Per TURNER & STUART, *Att'ys.*
L. KAHN.
E. KAHN.

Approved, this July 12th, 1882.

ALEX. S. FIELD, *Clerk.*

File. Appeal bond filed with assignment of errors. Filed July 12th, 1882. Alex. S. Field, clerk D. C., H. Co., Texas.

Assignment of Errors. Filed July 12th, 1882.

In the District Court, Harrison County. Spring Term, 1882.

LAURA KIRK
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY. } 6993.

And now comes the defendant in the above and assigns the following as errors committed by the district court of Harrison county upon the trial of the above cause:

1st. The court erred in not removing this cause to the Hon.
143 U. S. district court of America for the eastern district of Texas upon the filing of the petition and bond for removal by defendant.

2d. The court erred in not allowing defendant to prove by witness Taylor that it was the duty of agents and employees of defendant to report the bad condition of road when it came to their knowledge.

3d. The court erred in not allowing defendant to prove, by witness Taylor, the conditions upon the pass held by Kirk, the deceased.

4th. The court erred in allowing plaintiff to prove, by witness Horn, that about the time of the accident in question other wrecks occurred on the defendant's road.

5th. The court erred in allowing plaintiff to prove by witness Lee White and J. H. Swindle the general condition of defendant's road, and road-bed at other points than at the point of accident.

6th. The court erred in allowing White and Swindle to testify as to the number of hands it required to keep a railroad section in repairs, they not having qualified themselves to speak.

144 7th. The court erred in not giving all the special charges asked by defendant.

8th. The court erred in charging that certain acts of defendant would constitute culpable negligence.

9th. The court erred in not charging the jury that the degree of care to be exercised by defendant toward an employee riding upon.

a free pass was different and less strict than that required to be exercised toward a regular passenger paying fare.

10th. The court erred in not charging the jury that the plaintiff must make the proof correspond with the allegation of the petition; and having based his cause of action upon a missing rail, can recover only upon proof of same.

11th. The court erred in overruling defendant's motion for a new trial.

12th. The court erred in not sustaining the special demurrer of defendant to plaintiff's petition.

TURNER & STUART,
Att'ys for Def'd't.

Filed. Assignment of errors. Filed with appeal bond. Filed July 12, 1882. Alex. S. Field, clerk D. C., H. Co., Texas.

145 *Cost Bill.*

LAURA KIRK
vs.
T. AND P. RAILWAY CO. } No. 8993.

To ALEX. S. FIELD, Clerk D. C., H. Co., Dr.

To fil. due tax cost, 60; cop. ret., $3.50	$4 10
2 cits., $1.50; fil. int. to G. A., 15; copy, $1.50; precept, 75	3 90
Fil. cross-int., 15; copy direct and X int., $2.00; com., 75	2 90
Fil. app's for subp., 30; 2 subpœ's, $1.50; 7 witnesses	1 80
Fil. int. and X to White and Swindell, 30; copy, $3.00; com., 75	4 05
Fil. ans., 15; fil. 2 pet. for removal, 30; affid. and seal, 50,	95
Fil. 2 bonds, 30; fil. and doc. mot., 30; fil. am'd. ans., 15	75
Order on same, 75; fil. 1st supp. pet., 15; ord. on same, 75,	1 65
Fil. int. and X to Hays and Wesly, 30; copy, $3.75	4 05
Transcript to U. S. court at Jefferson	36 00
Fil. and doc. mot. contin., 30; affid. and seal, 50	80
Ord. on mot. to con., 75; fil. 2 affid'v'ts, 30; subp. 7 wit., $1.15	2 20
Fil. grounds of obj. to removal, 15; fil. int. to Hays, 15	30
Copy, $2.00; precept, 75; order on demurrer, 75	3 50
F. X int. to Hays, 15; copy direct and X, $3.00; com., 75; cost, 20	4 10
Imp. jury, 35; fil. 2 charges, 30; verdict, 35; judgment, 75	1 75
3 subpœ's 75; motion new trial, 30	1 05
Ord. on same, 75; fil. ass'm't errors, 15	90
Fil. and approve appeal bond, $1.65; fil. stat. facts, 15	1 80
Fil. brief, 15; certif. and seal to 5 briefs, $2.50	2 65
Transcript to Supreme Court	60 00

To Sheriff Perry:

Serving a cit. and mileage, $1.60; 5 subpœ's, $3.60	$5 20
Serving precepts, $1.60; 1 subpœ., $1.20; 1 notice, $1.60	4 40
Subp. 7 witnesses and mil., $4.20; jury fee, 50	4 70
	$153 50

146 THE STATE OF TEXAS, *Harrison County:*

I, Alex. S. Field, clerk of the district court of Harrison county, State of Texas, do hereby certify that the foregoing contain a true and correct copy of all the proceedings in the cause of Laura and George Anna Kirk *vs.* The Texas & Pacific Railway Company, No. 6998, pending in said district court.

In testimony whereof, I hereto sign my name and affix the seal of said district court, at office, in the city of Marshall, this September 25th, A. D. 1882.

ALEX. S. FIELD,
Clerk District Court, Harrison County, Texas.

147 Be it remembered, that at a term of the hon. supreme court of the State of Texas, begun and holden at Tyler, on the 1st day of October, A. D. 1883—present, Hon. A. H. Willie, chief justice, and associate justices John W. Stayton and C. S. West—in the cause The Texas and Pacific Railroad Company *vs.* Laura and G. A. Kirk, No. 1281, appeal from Harrison, the following judgment was rendered October 19th, 1883: "This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is therefore considered, adjudged, and ordered that the judgment of the court below be in all things affirmed; that the appellee, Laura Kirk, recover of the appellant, The Texas and Pacific Railroad Company, and its sureties, L. Kahn and E. Kahn, the amount adjudged below, and all costs in this behalf expended, and this decision be certified below for observance.

I, S. D. Reaves, clerk of the supreme court of Texas, at the city of Tyler, hereby certify that the foregoing is a true copy of all the orders made by this court in the above-entitled and numbered cause.

In witness whereof, I hereunto set my hand and affix the seal of said court at Tyler, this 6th day of November, A. D. 1883.

[SEAL.] S. D. REAVES, *Clerk.*

148 *Appeal from Harrison County.*

THE TEXAS AND PACIFIC RAILWAY COMPANY, Appellant,
vs.
LAURA KIRK, Appellee. } 1281.

The petition for the removal of this cause from the district court

of this State to the United States circuit court is in all material respects the same as was the petition for removal in the case of the Texas and Pacific Railway Company *vs.* McAllister, decided at the last Austin term of this court, 59 Texas. In that case it was held that the petition for removal stated no sufficient grounds therefor. In this case no authority or reason has been brought forward inducing us to doubt the correctness of the decision made in the case referred to, and without again giving the reasons; for the reasons given in that case, we hold that the petition for removal was insufficient, and that the court below did not err in retaining and trying the case. It is not urged that the application was sufficient under any other of the removal acts than the act of July 27th, 1868; hence we deem it unnecessary to consider it under any other.

149 The 4th assignment asserts that the admission of the testimony of a witness, to the effect that another train on the appellant's railway, on the same day and near the same place as that on which the husband of the appellee was injured, was thrown from the track, was error.

The 5th assignment asserts that the court erred in permitting two witnesses to state the condition of appellant's track in the vicinity of the place where the train was thrown from its track at the time the appellant's husband was injured, and for some time prior thereto.

The pleadings in this cause in reference to the manner in which the injury complained of was caused, as to the condition of appellant's road at the place and in the vicinity of the place where the injury occurred; as to its negligence in not keeping its road in good and safe condition, and also as to its knowledge of the dangerous condition of its track, and its indifference to the safety of passengers, as well as the relief sought, *i. e.*, damages both actual and exemplary, and substantially the same as in the case of the

150 same appellant against DeMilly, decided this day; the injuries in which the appellee in that case and in this complain of having been inflicted at the same time, and resulting from the same cause.

In the case of the Texas and Pacific Railway Company *vs.* DeMilly, the questions presented by the 4th and 5th assignment were considered, and it was held that the evidence was admissible, and for the reasons given in that case we now hold in this.

The 2d, 3d, and 6th assignments of error are waived, and the 7th is, "The court erred in not giving all the special charges asked by defendant."

There are thirteen special charges asked by the defendant upon a variety of subjects, upon some of which the court in the main charge had, in effect, given the same, and the only matter which can be considered under this assignment is, was it error in the court to refuse to give them all.

The 1st, 2d, and 13th instructions asked were, in substance, that

the plaintiff could not recover if the injury was not caused by a broken and partly missing rail. The petition alleged that the rail which caused the cars to be thrown from the track was, and
151 had been broken for several days before the injury, and that a part of the rail was missing, and it is claimed that both of these defects must have been proved to authorize a recovery.

We do not so understand the rule. The general rule regulating the sufficiency of evidence is, that it is sufficient if the substance of the issue be proved. 1 Greenleaf, 56.

The substance of one of the issues in this case was: *Was the track of the appellant's road unsound and unsafe by reason of a defective rail*, and was that the cause of the injury?

It was alleged that the track was defective in two respects: 1st, That the rail was and had been for some time broken; 2d, That a part of the broken rail was missing. Proof of either of these facts would have been sufficient to establish the defective character of the track, and to sustain so much of the issue, and if the other evidence in this case showed that such defect caused the injury then, the matter in issue was sufficiently proved, in so far as it was necessary to show the cause of the injury, and so far as the issue under consideration was concerned.

152 In the case of the Pittsburg, Ft. Wayne and Chicago R'y Co. *vs.* Ruby, 38 Ind., 305, it was alleged that the *conductor* and *brakeman* on a freight train carelessly and negligently failed to properly adjust a switch and *signaled* a passenger train to advance. The jury found that neither the conductor nor the brakeman signaled the train to advance, but that the *employees* of the company did so, and it was claimed that there was a variance between the pleading and proof, or verdict. The court held that there was no variance between the pleadings and the special verdict.

The court would have erred if it had given the charges referred to.

The appellant, sought, by the 7th special instruction, to have the jury instructed in effect, that they must find for the defendant if the deceased was an employee of the company, and the injury was caused by the negligence of a servant of the company.

It appears that the deceased was stock and fuel agent for the appellant, and that his duty called him frequently to be upon the trains. The petition alleged, and the proof tended to show, that the injuries was caused by a defective track. Such being the
153 case the court would have erred if it had given the instructions asked for, even if the deceased was an employee, (within the meaning of the rule which ordinarily prevents a servant from receiving damages from the master for an injury received from the negligence of a servant in the common employment,) as held in the Texas M. R. Co. *vs.* Whitmore, 58 Tex., 277, and cases therein cited, the duty to have a sound track was the duty of the appellant, for which it could not excuse itself under the plea that its employees

had originally failed to so construct it, or that after so constructed they had failed to keep it in proper order.

The 7th assignment of error is so general that it cannot be further considered, no error appearing which goes to the foundation of the action. Rules 24, 25, 26, 47 Tex., 602; Green *vs.* Dallahan & Co., 54 Tex., 285; 54 Tex., 46; 46 Tex., 589; 45 Tex., 415; 44 Tex., 540.

The 10th assignment of error has been considered substantially under the 7th assignment, and raises the question of variance between the pleading and proof, and need not be further considered.

The 11th assignment is, "The court erred in overruling defendant's motion for a new trial."

154 The motion for a new trial is based upon 10 separate and distinct grounds, and under the well-settled rule of this court the assignment must be held not to specify the grounds of error relied on. Rules 24, 25, and 26, 47 Tex., 602; Houston & T. C. R'y Co. *v.* Shaefer, 54 Tex., 641; Green *v.* Dallahan & Co., 54 Tex., 281; Flannagan *v.* Womack & Perry, 54 Tex., 46; Tompkins *v.* Toland, 46 Tex., 589; Lampkin *v.* Trunnel, 46 Tex., 56; Clements *v.* Hearn and wife, 45 Tex., 415; Austin *v.* G. C. & S. F. R. R. Co., 45 Tex., 268; Denson *v.* Payne, 44 Tex., 540. And it not appearing that in this respect there is any error going to the foundation of the case or to the right and justice of the decision, the assignment cannot be considered. The verdict of the jury is large, but even if the amount of the verdict was assigned as error, we could not say under the evidence that it was so evidently excessive as to justify this court in setting it aside.

The 12th assignment of error is, "The court erred in not sustaining the special demurrers to plaintiff's petition."

The only matter urged under this assignment is that the petition gave the conclusions of the pleader in regard to certain

155 matters; this is true, but the facts upon which the conclusions were based wrongfully stated, and if true, justifies the conclusions drawn from them, and the appellant could not have been prejudiced by the ruling of the court.

There is no such error presented as requires or would justify the reversal of the judgment of the court below, and its judgment is affirmed.

STAYTON, *Associate Justice.*

156 In the Supreme Court of Texas, holding session at Tyler.
October Term, 1883.

THE STATE OF TEXAS, *Smith County:*

THE TEXAS PACIFIC RAILWAY COMPANY, Appellant,
vs.
LAURA KIRK, Appellee.

To the Hon. Asa Willie, Chief Justice of the Supreme Court of Texas:

Your petitioner, The Texas and Pacific Railway Company, a body

corporate, created by an act of the Congress of the United States, entitled An act to incorporate the Texas Pacific Railroad Company, etc., etc., approved March 3d, 1871, and an act supplementary thereto, approved May 2d, 1872, shows your honor that Laura Kirk and Georgiana Kirk begun a suit in the district court of Harrison county, Texas, seeking to recover damages in the sum of $100,000 for the death of W. G. Kirk, who was husband to said Laura, and a son of the said Georgiana, charging the death of W. G. Kirk to have been caused by the negligence of your petitioner, said suit was filed March 23d, 1881, and returnable to April term, 1881, of said court.

Petitioner further shows that on May 2d, 1881, it being a day of the April term of said court, and before said cause was called for trial, your petitioner filed a petition to remove said cause to the circuit court of the United States for the eastern district of Texas, at Jefferson, Texas, said petition being upon two grounds. 1st. That petitioner was a corporation created by Congress, and had a de-
157 fence to said action arising under an act of Congress, and on the further ground that Georgiana Kirk was a citizen of the State of Virginia, and was so at the date of the execution of said suit. The removal being sought under the act of 1868 of Congress, conferring the right of removal upon corporations created by Congress, etc., as well as under the removal of 1875, and on the 13th day of May, 1881, it being also a day of the April term, 1881, of said court, and before said cause was called for trial, your petitioner filed another petition to remove said cause to the circuit court aforesaid, the second petition being on the same grounds as stated in the first petition, and in addition thereto, claims to remove, because the residence and domicile of your petitioner is at the city of Philadelphia, and State of Pennsylvania, and that your petitioner was, at the date of filing said suit, a citizen of Pennsylvania.

And your petitioner, at the time of the filing each of the petitions, executed and filed good and sufficient bonds with surety. Said bonds and sureties being approved by the judge of the district court of Harrison county, and were both conditional as required by the acts of Congress aforesaid.

Petitioner shows that the said petitions for removal were, on the 16th day of May, 1881, presented to the district court of Harrison county, and that said court, on hearing, refused to remove said cause to the U. S. circuit court aforesaid, but retained jurisdiction thereof, and required petitioner to defend in said court.

158 Your petitioner shows that at the May term, 1882, said cause was tried, and that Georgiana Kirk, the mother, died before that date, and the suit was prosecuted by Laura Kirk, and that said trial resulted in a judgment against your petitioner for twelve thousand five hundred dollars, from which judgment your petitioner appealed to the supreme court of Texas, the same being the court of last resort in this State; and among the errors assigned in the supreme court was one to the effect that the district court

erred in refusing to remove said cause to the U. S. circuit court, and that said cause was determined in the supreme court on the 19th day of October, 1883, and said supreme court affirmed the judgment of the district court and affirmed the action of the district court in refusing to remove said cause, and said supreme court gave judgment in said cause on Oct. 19, 1883, against your petitioner and L. Kahn and E. Kahn for said sum of $12,500 dollars, and interest; and for that your petitioner believes that our honorable supreme court was in error in affirming the judgment of the district court aforesaid in refusing to remove said cause, and was in error in holding that your petitioner could not remove the same, and that the petitions therefor were not sufficient, and in holding that the State court could make any order whatever after
159 petition filed, except to approve the bond and remove the cause, and to the end that the said errors may be reviewed and corrected by the Supreme Court of the United State of America, the same arising out of the removal acts of Congress of 1868 and 1875. Your petitioner prays your honor to grant a writ to the Supreme Court of the United States of America, now in session, and that the same be made returnable to the city of Washington on or before the 20th day of November, 1883; and he prays that service of said writ be made upon Laura Kirk or her attorneys, F. B. Sexton and William Stedman, and that a certified copy of said writ be made out for that purpose by the clerk of this court; and it prays for all other necessary and appropriate things to be done, in order to perfect the writ and bring said cause before the Supreme Court of the United States.

JAMES TURNER,
Attorney for The Texas and Pacific Railway Company.

Allowed—
A. H. WILLIE,
Chief Justice Supreme Court of Texas.

160 The President of the United States to Laura Kirk, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, now in session, on the 30th day of November, 1883, pursuant to a writ of error filed in the office of the clerk of the supreme court of Texas, at the Tyler branch of said court, wherein The Texas and Pacific Railway Company and L. Kahn and E. Kahn are plaintiffs in error, and you, Laura Kirk, is the defendant in error, to show cause, if any there be, why the judgment mentioned in said writ of error should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison Waite, Chief Justice of the Supreme

Court of the United States, on this, the 29th day of October, in the year of our Lord one thousand eight hundred and eighty-three.

A. H. WILLIE,
Chief Justice Supreme Court of Texas.

Attest—
[SEAL.]

S. D. REAMS,
Clerk Supreme Court of Texas, with the seal of said Court, this Oct. 29, 1883.

161 TEXAS AND PACIFIC R'W'Y CO. *et al.*, Pl'ffs in Error,
vs.
LAURA KIRK, D'f't in Error.

Know all men by these presents, that we, The Texas and Pacific Railway Company, L. Kahn, and E. Kahn, as principals, and W. H. Poland and J. H. Thompson, all of Harrison county, Texas, as sureties, are held and firmly bound unto Laura Kirk in the full and just sum of thirty thousand dollars ($30,000), to be paid to the said Laura Kirk, her executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, by these presents. Sealed with our seals and dated this, the 29th day of October, in the year of our Lord one thousand eight hundred and eighty-three.

Conditioned that whereas there lately was pending in the hon. supreme court of the State of Texas, holding sessions at Tyler, a certain suit styled, from the docket of said court, The Texas and Pacific Railway Company, appellant, *vs.* Laura Kirk, appellee, the said suit being an appeal from the district court of Harrison county, Texas, wherein judgment was rendered in favor of the said Laura Kirk, and against the Texas and Pacific Railway Company,
162 for the sum of twelve thousand five hundred dollars ($12,500), and the cost; and the said supreme court of the State of Texas, the same being the court of final resort in said State, on the 19th day of October, 1883, rendered judgment in said cause affirming the judgment of the district court, and giving judgment against The Texas and Pacific Railway Company and L. Kahn and E. Kahn, its sureties, in the sum of twelve thousand five hundred dollars with interest and all cost of suit; and the said Texas and Pacific Railway Company having applied for and obtained a writ of error from said supreme court of Texas to the Supreme Court of the United States, the same being signed by the Hon. Asa H. Willie, chief justice of the supreme court of Texas, and citation to the said Laura Kirk, citing and admonishing her to appear at a Supreme Court of the United States, now in session, on the 20th day of November, 1883.

Now, if the above-bound Texas and Pacific Railway Company and L. Kahn and E. Kahn shall prosecute said writ of error to effect, and answer all damages and cost if they fail to make their plea

good, then the above obligation is to be void, else to remain in full force and virtue.

Witness our hands and seals this, the —— day of October, A. D. 1883.

THE TEXAS AND PACIFIC RAILWAY COMPANY. [SEAL.]

163 L. KAHN. [SEAL.]
E. KAHN. [SEAL.]
W. A. POLAND. [SEAL.]
J. H. THOMPSON. [SEAL.]

Signed, sealed, and delivered in presence of—
S. T. SCOTT.

Approved: A. H. WILLIE,
Chief Justice Supreme Court of Texas.

164 The State of Texas to the Sheriff or any lawful officer of Harrison County, Texas, Greeting:

You are hereby commanded to serve with the certified copy of citation in error hereto attached Laura Kirk, if to be found in your county, instanter, and herein fail not, but make due return of this writ, showing how and when you made such service under the penalty prescribed by law.

Witness the Hon. A. H. Willie, chief justice of our supreme court of the State of Texas, with the seal thereof annexed, this Oct. 30, A. D. 1883.

[SEAL.] S. D. REAVES, *Clerk.*

Sheriff's Return.

Came to hand Nov. 1st, 1883, at 3 o'clock p. m., and executed on the 1st day of November, 1883, by delivering to Laura Kirk in person, in the city of Marshall, in Harrison county, Texas, the accompanying certified copy of citation in error, together with copy of this notice.

S. R. PERRY,
Sheriff, Harrison County, Texas.
By A. S. CURTIS, *Deputy.*

Fee, $1.50.
Mileage, 10 c.; total, $1.60.

165 THE STATE OF TEXAS:

I, S. D. Reaves, clerk of the supreme court of the State of Texas, at Tyler, hereby certify that the above and foregoing is a true and correct copy of all the proceedings in the cause of The Texas and Pacific Railway Company *vs.* Laura Kirk, appeal from Harrison county, had in our supreme court.

In testimony whereof, I hereto attach my name officially, and the seal of supreme court, this the 6th day of November, A. D. 1883.

[SEAL.] S. D. REAVES,
Clerk Supreme Court.

166 The President of the United States to the Honorable Judges of the Supreme Court of Texas, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of Texas before you, or some of you, being the highest court of law or equity of the said State of Texas, in which a decision could be had in the said suit, The Texas and Pacific Railway Company, appellant, and Laura Kirk, appellee, as the same is styled and docketed in said supreme court of Texas, and in which said suit was drawn in question and adjudicated, the right of the Texas and Pacific Railway Company to remove said cause from the State court to the circuit court of the United States for the eastern district of Texas, under the act of 1868 of Congress providing for the removal of causes by corporations created by Congress, (other than banking corporations,) and under the general removal act of 1875 of the Congress of the United States, and the decision of said supreme court of Texas was in favor of Laura Kirk, and against the said Texas and Pacific Railway Company, and adversely to the right of said company to remove said cause to the circuit court of the United States under the acts of Congress aforesaid, in which decision, so made and rendered in the said supreme court of Texas, a manifest error hath hap-

167 pened, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under you seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the 30th day of November, A. D. 1883, in the said Supreme Court of the United States, now in session at said city of Washington; that the record of the proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Asa H. Willie, chief justice of the said supreme court of Texas, this the 29th day of October, in the year of our Lord one thonsand eight hundred and eighty-three.

A. H. WILLIE,
Chief Justice Supreme Court Texas.

Attest—

[SEAL.] S. D. REAVES,
Clerk Supreme Court of Texas,
with the seal of said Court, Oct. 29, 1883.

168 Endorsed: Texas and Pacific Railroad Company, pl'ff in error, *vs.* Laura Kirk, defendant in error. Writ of error. Filed Oct. 29, 1883. S. D. Reaves, cl'k sup. ct.

Supreme Court U. S. 1883. October term. No. 1221. The Texas and Pacific Railway Co. *et al.*, pl'ffs in error, *vs.* Laura Kirk

Writ of error. Office Supreme Court U. S. Filed Dec. 24, 1883. James H. McKenney, clerk. Filed 24th Dec'r, 1883.

169 The State of Texas to the Sheriff or any lawful officer of Harrison County, Texas:

You are hereby commanded to serve, with the certified copy of citation of error hereto attached, Laura Kirk, if to be found in your county, instanter, and herein fail not; but make due return of this writ, showing how and where you made such service, under the penalty prescribed by law.

Witness the Hon. A. H. Willie, chief justice of our supreme court of the State of Texas, with the seal thereof annexed, this October 30th, A. D. 1883.

S. D. REAVES, *Clerk.*

Endorsed: Supreme Court U. S. 1883, October term. No. 1221. The Texas and Pacific Railway Co. *et al.*, pl'ffs in error, *vs.* Laura Kirk. Proof of service of citation. Filed 26 Dec., 1883. T. & P. R'y Co. *vs.* Laura Kirk. Precept.

170 Came to hand November 1st, 1883, at 3 o'clock p. m., and executed on the 1st day of November, 1883, by delivering to Laura Kirk, in person, in the city of Marshall, in Harrison county, Texas, the accompanying certified copy of citation of error, together with copy of this notice.

S. R. PERRY,
Sheriff of Harrison County, Texas.
By A. S. CURTIS, *Deputy.*

Fee ----------	$1 50
Mileage ------	10
Total ----	$1 60

Endorsed: The Texas and Pacific Railroad Company, plaintiff in error, *vs.* Laura Kirk, defendant in error. Error from supreme court of Texas, at Tyler. Applied for on the 29th day of October, A. D. 1883, by Hon. James Turner, counsel for the plaintiff in error, and delivered to the Hon. James Turner, Nov. ——, 1883. S. D. Reaves, cl'k sup. c't Texas, at Tyler.

Endorsed on cover: Texas supreme court. No. 1221. The Texas and Pacific Railway Company, plaintiff in error, *vs.* Laura Kirk. Filed 30th November, 1883.

115 — 2 Kirk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1883. NO. 1221.

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

LAURA KIRK,

Defendant in Error.

BAR ASSOCIATION

Argument against the Motion to Dismiss and the Motion to Affirm.

JOHN F. DILLON,
JOHN C. BROWN,
WAGER SWAYNE,
For Plaintiff in Error.

W. D. DAVIDGE,
Of Counsel.

BURGOYNE, Printer, 57, 59 & 61 Park Street (Law Telephone 587), N. Y.

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Supreme Court of the United States.

OCTOBEB TERM, 1883, No. 1221.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

LAURA KIRK,
Defendant in Error.

Argument against the motion to dismiss and the motion to affirm.

Statement of Case.

This action was brought March 23d, 1881, by Laura Kirk and George Anna Kirk, in the State District Court of Harrison County, Texas.

The *character of the parties* is thus alleged in the petition or complaint:

"The petition of Laura Kirk, a resident of Harrison County, in the State of Texas, and George Anna Kirk, a resident citizen of Albemarle County, in the State of Virginia, as plaintiffs, against the Texas and Pacific Railway Company, a corporation duly incorporated by various and concurrent acts of the Congress of the United States, and of the legislature of the State of Texas, having its legal Texas domicile and its principal Texas office in the City of Marshall, and the County of Harrison, in said State of Texas, as defendants, respectfully represents: That the plaintiff, Laura Kirk, is the surviving widow, and the plaintiff, George Anna Kirk, is the surviving mother of William Garth Kirk, late of

the County of Harrison, in the State of Texas, now deceased."

Record, p. 1.

For *cause of action* the petition alleges in substance that one William Garth Kirth (the husband of the said Laura, and the son of the said George Anna) was on the 6th day of November, 1880, a passenger, traveling on the cars of the defendant company, which when running at the rate of forty miles per hour were thrown from the track down an embankment of thirty feet, by means whereof William Garth Kirk was severely wounded and injured, of which said wounds and injuries the said Kirk within less than thirty-six hours after receiving the same, and as a direct and immediate result thereof, died in the town of Marshall, in the County of Harrison, in the State of Texas; that the immediate and direct cause of said injury was the failure and neglect of said company to keep its rails and track in good order and condition; that the injury was caused by a broken rail and defective track; that the company knew of such broken rail or defective track, or by the exercise of ordinary care and diligence, which it was bound to exercise, could have known it.

The plaintiff, Laura (wife), claims actual damage on account of actual destruction of the life of her husband in the sum of fifty thousand dollars. The plaintiff, George Anna (mother), the sum of twenty-five thousand dollars, and the complaint demands exemplary damages in favor of both plaintiffs, to be divided between them, as the jury trying the

case may direct, in the sum of twenty-five thousand dollars.

Record, pp. 1–3.

AN ANSWER was filed the first term, in general denial of the complaint.

Record, p. 4.

At the same term, May 2, 1881, the defendant company filed a PETITION FOR THE REMOVAL of the cause into the Federal Court.

Record, p. 6.

And on the 13th of May another petition for such removal (Record, p. 9), accompanied with proper bonds.

THE PETITIONS FOR REMOVAL WERE BASED UPON THREE GROUNDS:

FIRST. "That the said action is a suit of a civil nature at law, and the matter in dispute, exclusive of costs, exceeds five hundred dollars, and *arises under the laws of the United States.*"

SECOND. *Under Section 640 of the Revised Statutes*, originally the Act of July 27, 1868, namely, that the defendant is a federal corporation, and "has a defense to said action arising under and by virtue of a law of the United States, to wit, said act of incorporation," of the Texas & Pacific Railway Company, viz., the Act of Congress approved March 3, 1871, and an Act supplementary thereto, approved May 2d, 1872.

THIRD. *On the ground of citizenship;* that is to say, that the plaintiff Laura is a citizen of *Texas;* that the plaintiff George Anna is a citizen of *Virginia;* and the defendant, by virtue of the action of its stockholders and directors establishing its domicile and principal place of business in the City of Philadelphia, in the State of Pennsylvania, is, for fed-

eral jurisdictional purposes, a citizen of *Pennsylvania.*

Record, pp. 6, 9.

The plaintiffs contested the petition of the defendants for the removal of the cause, on ten grounds, elaborately arrayed in the record (Record, pages 11 to 13), such as:

"2d. Because said petition for removal presents no facts that constitute a defence, arising under the constitution and laws of the United States" (p. 11).

"5th. Because the Government of the United States has no constitutional authority to create a corporation to construct and operate a railroad in a State" (p. 12).

7th. In substance, that section 640 is unconstitutional and void (p. 12).

8th. Because the defendant by virtue of various acts therein specified, is a State and not a federal corporation, &c. (p. 12, paragraph 8th).

The petition to remove the case was overruled May 16, 1881; and the defendant excepted.

Record, page 13.

At the subsequent trial in the State Court, on the 29th of May, 1882, the counsel of the plaintiff having suggested the death of George Anna Kirk, one of the plaintiffs; ordered by the Court: "that this suit abate as to the said George Anna Kirk, and the same be henceforward prosecuted for the sole use and benefit of the plaintiff Laura Kirk."

Record, page 61.

Trial by jury. Verdict for twelve thousand five hundred dollars ($12,500) actual damages.

Record, page 61.

Judgment on this verdict.

Record, page 57.

JUDGMENT WAS AFFIRMED by the Supreme Court of Texas on the first day of October, 1883.

Record, page 64.

Opinion of the Supreme Court on affirming the judgment.

Record, pp. 64 to 67.

Petition for writ of error to Supreme Court, citation, bond and writ of error.

Record, pp. 67–73.

Assignment of errors in this Court:

Record, page 62.

Among others, that the Court erred in not removing this cause, as prayed, into the Federal Court, that is, in entertaining jurisdiction and proceeding to trial and judgment.

Statute Provisions.

The Congress of the United States has chartered four great trans-continental lines, viz.:

The Union Pacific Railroad Company,
The Northern Pacific Railroad Company,
The Atlantic & Pacific Railroad Company,
The Texas & Pacific Railroad Company.

In the charter of the "*Union Pacific Railroad Company*" Congress created a corporation under

that name, and in section 1 (12 Stat. at Large, 489) enacted July 1, 1862, that

"It shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States."

In the case of the "*Northern Pacific Railroad Company*," Congress created a corporation by that name, and enacted, July 2, 1864, that

"It shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States" (13 Stat. at Large, pp. 365, 366, Sec. 1).

In the case of the "*Atlantic & Pacific Railroad Company*," Congress created a company by that name, and enacted, July 27, 1866, that

"It shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States" (14 Stat. at Large, 202).

In the case of the "*Texas & Pacific Railroad Company*" (name afterwards changed to Texas & Pacific Railway Company), Congress enacted, March 3d, 1871 (16 Stat. at Large, 573), that certain named persons, their associates and successors, are

"Hereby created a body politic and corporate in fact and in law, by the name, style and title of the Texas & Pacific Railroad Company, and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States."

Scheme of the Texas & Pacific Charter.

The scheme of Congress, by the Texas & Pacific act of March 3d, 1871, was to provide a southern,

through, continuous, independent, transcontinental, national line, traversing the State of Texas, the territories of Arizona and New Mexico, and the State of California, on the thirty-second parallel, to connect by railroad (see section 22) the Mississippi and New Orleans with the Pacific Ocean at San Diego and (Sec. 23) San Francisco. The supplemental act of May 2, 1872 (17 Stat. at Large, 59), required the company to construct its road from Marshall, Texas, to Shreveport, La.

By Sec. 3 of the charter, Congress fixes capital stock of the Texas Pacific at fifty millions, not to be increased except by the consent of Congress.

Sec. 4. Congress authorizes the purchase of and consolidation with any other railroad company chartered by congressional, state or territorial authority, provided it be not a competitive through line to the Pacific Ocean.

Sec. 8. Grants a right of way.

Sec. 9. Makes a land grant.

Sec. 11. Authorizes the issue of bonds and mortgages.

Sec. 15. Provides that other intersecting roads may connect, prohibits discriminations, and enacts further, "that the *rates* charged for carrying passengers and freight, per mile, shall not exceed the prices which may be fixed by Congress for carrying passengers and freight on the Union Pacific and Central Pacific Railroads."

Sec. 16 requires it to be constructed of iron or steel rails manufactured from American ore.

Sec. 17 requires the road to be completed from the "eastern boundary of the State of Texas to the Bay of San Diego, in the State of California, within ten years, *and upon failure so to complete it, Congress may adopt such measures as it may deem necessary and proper to secure its speedy completion.*"

Sec. 19 shows the *national character* of the road by enacting that it "*shall be a military and post road;* and for the purpose of insuring the carrying

of the mails, troops, munitions of war, supplies and stores of the United States, no act of the company nor any law of any State or Territory shall impede, delay, or prevent the said company from performing its obligations to the United States in that regard."

THE STATUTE OF TEXAS (Revised Stat. of Texas, 1879, p. 419), *concerning injuries resulting in death*, enacts:

Art. 2889. "An action for actual damages on account of injuries causing the death of any person, may be brought in the following cases:

1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any railroad, steamboat, stage-coach or other vehicle for the conveyance of goods or passengers, or by the unfitness, gross negligence or carelessness of their servants or agents.

Art. 2903. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused" (Revised Statutes of Texas, 1879, p. 419).

(10)

THE DEFENDANT IN ERROR moves to dismiss the writ of error for want of jurisdiction, uniting therewith a motion to affirm the judgment under Rule Six, which motion to affirm must under that rule be based on the ground "that it is manifest that the writ of error was taken for delay only or that the question on which the jurisdiction of the Supreme Court depends is so frivolous as not to need further argument."

These motions will be considered separately: and FIRST, *the motion to dismiss the writ of error.*

Argument in opposition to the motion to dismiss for want of jurisdiction.

Two objections, both matters of *form*, are urged against the sufficiency of the writ of error in this case.

> *1. That the writ should have been made to bear the teste of the Chief Justice of the United States, and should have been under the seal of the Federal Court, instead of bearing the teste of the Chief Justice of the Supreme Court of Texas, and being under the seal of said Court.*
>
> *2. That the writ should have been made returnable to the October Term, 1884 (i. e., the first day of said term), instead of the 30th day of November, 1883, as in the writ..*

THE FIRST OBJECTION is entirely without merit. It is true that the statutes of the United States do not expressly authorize the Chief Justice of the Supreme Court of a State to teste a writ of error. The nearest approach to an express authorization is found in the 25th section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), which subsequently became a part of Sec. 999 of the Revised Statutes. That section reads as follows:

"Sec. 999. When the writ is issued by the Supreme Court to a Circuit Court, the citation shall be signed by a Judge of such Circuit Court, or by a Justice of the Supreme Court, and the adverse party shall have at least thirty days notice; and when it is issued by the Supreme Court to a State Court, the citation shall be signed by the Chief Justice, or Judge, or Chancellor of such Court rendering the judgment or passing the decree complained of, or by

a Justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice."

In *Bartemeyer vs. Iowa*, 14 Wall., 36, we have express authority that a writ of error may be allowed by the Chief Justice of the Supreme Court of a State. Mr. Justice MILLER, in delivering the opinion of the Court in this case, said:

"The statute requires that the citation must be signed by the Chief Justice, or Judge or Chancellor of the Court rendering or passing the judgment or decree complained of, or by a Justice of the Supreme Court of the United States. *It has been the settled doctrine of this Court that a writ of error to a State Court must be allowed by one of the Judges above mentioned*, or it will be dismissed" (14 Wall., 27). And again: "We are of opinion that the Act of Congress required that, when the Court is so composed (*i. e.*, of a Chief Justice and Associate Justices), the writ can only be allowed *by the Chief Justice of that Court*, or by a Justice of the Supreme Court of the United States" (14 Wall., 28).

In the earlier case of Gleason vs. Florida (9 Wall., 779–784,) the Court, by Chief Justice CHASE, observed:

"The foundation of the jurisdiction of this Court over judgments of State Courts is the writ of error; and no writ of error to a State Court can issue without allowance, *either by the proper Judge of the State Court*, or by a Judge of this Court, after examination, as just stated."

The objection made by the defendant in error is that this writ of error is "*in the name of the Chief Justice of the Supreme Court of Texas, and is attested by the Clerk of that Court, and sealed by the seal of that Court.*" To this we answer that the

writ is not in the name of the Chief Justice of Texas. *It runs in the name of the President of the United States.* Since the statute expressly authorizes the Chief Justice of the Supreme Court of the State to sign the citation, and the settled practice is that this officer may *allow* a writ of error, we confidently submit that only proper evidence of allowance is such a testing and sealing of the writ as it appears in this case. Whether this is so or not, the defect in the writ, if any there be, is clearly amendable under the Act of Congress of June 1, 1873, appropriately entitled "An Act to further the administration of justice." The third section of this act will be found in Sec. 1005 of the Revised Statutes, which provides as follows:

"The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, *when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ*, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: *Provided*, the defect has not prejudiced, and the amendment will not injure the defendant in error."

The case of *Bondurant vs. Watson*, 103 U. S., 278, is cited by the defendant in error as conclusive of the objection that our paper "has no requisites of a writ of this Court." An examination of the case cited, however, clearly shows that this broad statement cannot be maintained. Our writ is clearly distinguishable from the paper upon which

the Court set the seal of its disapproval in that case. The writ in question did not run in the name of the President of the United States, or contain anything showing that it purported to be the writ of the Supreme Court of the United States. The writ ran as follows:

"*The Honorable Chief Justice of the Supreme Court of the State of Louisiana to the Clerk of the Supreme Court of Louisiana, Greeting,*" and the document concluded with a teste by the Chief Justice of the Supreme Court of Louisiana, and was signed by the clerk, and sealed with the seal of that Court. Mr. Chief Justice WAITE said in this document: "If we should permit the parties to change the seal or the title, or to do everything else which this section (1005 of the Revised Statutes) allows, there would still be no writ, *for nothing has been done either in the name of the President or under the authority of the United States.*" The words italicised tersely express the *ratio decidendi* of this case.

THE CONSTRUCTION of the third section of the Act of 1872 (R. S., Sec. 1005) by the Supreme Court has been entirely in harmony with the beneficent purposes which the framers of it had in view. Speaking of a writ of error in Bondurant vs. Watson, 103 U. S., 278–280, Mr. Chief Justice WAITE, who delivered the opinion of the Court, said:

"Had it been *even colorably issued* from this Court it might have been amended under section 1005 of the Revised Statutes, which is certainly very liberal." * * *

There remains to be considered the second objection to the validity of this writ, viz.: THAT IT DOES NOT CONTAIN THE PROPER RETURN DAY.

The defendant in error has cited three authorities which might be quite conclusive upon this point, but for the fact that they are all decisions which ante-date the curative act of 1872, which is expressed in section 1005 of the Revised Statutes, to which reference has already been made. Moreover, one of the cases cited by the defendant in error is in no wise parallel to the case under discussion. This is the case of *Villabolos vs. The United States*, 6 How., 88. The appeal was not perfected until more than six years after the rendition of the decree of the Court from which the appeal was taken, and therefore clearly not taken within the time limited by law, which, in analogy to the rules prescribed by law for writs of error, is the term of the appellate court next following the date of the writ.

In *Insurance Co. vs. Mordecai*, 21 How., 195, the first Monday in December being the first day of the term, the writ was made returnable on the second Monday of the following January, and in *Porter vs. Foley*, 21 How., 393, the writ was made returnable on the 3d Monday in the following January. In each of these cases (decided in the year 1858) the Court held, upon the proper motion being made, that it must dismiss for want of jurisdiction.

Now, that Sec. 1005 of the Revised Statutes is in force, of which counsel do not seem to be aware, it can subserve no pertinent purpose to cite cases like the two last mentioned. They are pointedly within the scope of the curative provisions of Sec. 1005.

This is apparent from the most casual reading of that section, and explicit authority to this effect is found in the case of *Hampton vs. Rouse*, 15 Wall., 684. In this case, after the first Monday in December had been abolished by act of Congress as the return day, and the second Monday in October substituted, a writ of error was made returnable to the first Monday of December. The Court, on this occasion, very shortly disposed of the matter. Upon a motion to amend the writ, the Court held that:

"Authority to amend it in the particular in question is given by the third section of the 'act to further the administration of justice' of June 1st, 1872" (Rev. Stats., Sec. 1005).

In *Atherton vs. Fowler*, 91 U. S., 143, the writ contained no return day, and the Court held that it might be amended under the authority of Sec. 1005 of the Revised Statutes, by inserting the proper return day.

The effort of the defendant in error to distinguish that case from the present is exceedingly labored, and must fail. The statute provides that proper amendments may be made provided they will not injure the defendant in error. It is not clear in what particular this defendant in error has been injured by the premature return of the writ and filing of the transcript. Had the converse been the case, *i. e.*, that the writ was not returned and the transcript not docketed until after the lapse of the next succeeding term, after judgment rendered, the objection now made might be urged with more force.

That this writ of error may be amended in the matter of the return day named, clearly appears

also from the case of *National Bank vs. Bank of Commerce*, 99 U. S., 608. In that case the judgment of the Court, which it was sought to review by writ of error, was rendered October 5th, 1878. The next term of the Supreme Court of the United States commenced October 15th following. The writ of error and citation were made returnable on the "second Monday in October next." A motion was made to amend the writ, so as to make the return day the first day, or the third Monday of the then term. This was on the 17th day of March, 1879. The Court granted the motion, Mr. Chief Justice WAITE saying: "We cannot see that the defect has prejudiced, or that the amendment will injure, the defendant in error." The Court held that the fact that thirty days could not elapse between the date of the writ and the return day, presented no objection. "The meaning of the statute," said the Chief Justice, "is not that the citation shall be served 30 days before the return day, but that the defendant in error shall have at least thirty days notice before he can be compelled to go to a hearing." (99 U. S., 609). The Court merely required that a new citation should issue, to notify the defendant in error of what had been done, whereupon the transcript might be filed and the cause docketed. The new citation in this case was made returnable on the first Monday in May following.

Before leaving this subject, it may be well to note the rule laid down by the Court in *Pierson vs. Udell*, 95 U. S., 294–296. The Court said: "The question arises whether the plaintiffs in error shall have leave to amend. Sec. 1005 of the Revised Statutes autho-

rizes this Court, in its discretion, and upon such terms as it may deem just, to allow an amendment of a writ of error, when the statement of the parties thereto is defective. The right of a party to amend is not absolute, but it is to be granted by the Court in its discretion. Whether it should be granted in a particular case must depend upon the attending circumstances. In this case we think the amendment ought not to be allowed. We have carefully looked through the record, and cannot find that any question is presented which has not been many times decided. * * * To grant the amendment would lead only to unnecessary delay and expense. It would put us to the expense of a new writ, and the plaintiff to the consequent delay." CUI BONO?

Argument in opposition to motion TO AFFIRM under Rule six.

The only ground of such a motion under Rule 6 is that "it is manifest that the appeal or writ of error was taken for delay only, or that the question on which the jurisdiction of this Court depends is so frivolous as not to need further argument."
Rule 6.

We do not intend what follows as an argument on the merits. This motion does not require an argument on the merits, and the 6th Rule will not permit it. Our only purpose is to show that the motion cannot be granted without overturning the judgment of this Court delivered by Chief Justice

MARSHALL, and the judgment of judges of great respectability and learning on the Circuit.

I.

THE FIRST GROUND OF REMOVAL IS THAT THE CASE WAS ONE ARISING UNDER THE LAWS OF THE UNITED STATES, VIZ., THE CHARTER OF THE TEXAS PACIFIC COMPANY, AND HENCE REMOVABLE UNDER THE ACT OF MARCH 3, 1875, WHICH EMBRACES ALL SUCH CASES OF A CIVIL NATURE INVOLVING MORE THAN $500.

We rely upon *Osborn vs. United States Bank*, 9 Wheaton, 740, and the cases referred to hereafter which follow it and apply its principles to cases like the present.

The facts in Osborn's case are familiar.*

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* "The Court having expressed a wish that the cause should be reargued upon the point of the constitutionality and effect of the provision in the charter of the bank which authorizes it to sue in the Circuit Courts of the Union, it was this day (March 11, 1824) argued upon that point by Mr. CLAY, Mr. WEBSTER and MR. SERGEANT for the jurisdiction, and by Mr. HARPER, Mr. BROWN and MR. WRIGHT against it" (p. 804).

The scope and exact legal value and effect of the opinion and judgment of the Court may be more clearly understood in the light of the propositions submitted and argued by the respective counsel.

FOR THE JURISDICTION it was *inter alia* said (the language seems to be that of Mr. WEBSTER):

"That Congress had constitutional authority to confer this jurisdiction on the Circuit Courts. 'It was a case arising under the Constitution and Laws of the United States.' Every case in which the Bank of the United States is a party, is in the strictest literal interpretation of the clause, a case arising under a law and the Constitut on of the United States. But for the law the case would never have existed. But for the continued existence of the law it could not continue to exist. If, by any conceivable means,

The following extracts from the judgment of the great CHIEF JUSTICE sufficiently show its application to the case at bar under the Act of March 3, 1875, as well as under Sec. 640, R. S.

The charter of the bank having conferred upon it the power to sue [in any case] "in any Circuit Court of the United States," the question was, whether the act was, in this respect, within the grant of judicial power of the United States, which extends to "all cases arising under a law of the United States."

MARSHALL, C. J. (p. 823):

"We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original

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the law were to be determined the case must be at an end. There is, therefore, an inseparable, indissoluble connection between the law and the case, as cause and effect. The case owes its being to the law and only to the law. The establishment of a corporation is a legislative creation of a faculty, of a moral being, invisible and intangible, but with capacities, powers and privileges, rights and duties. The rights it may acquire, the wrongs it may suffer, the obligations it may incur, the injuries it may inflict, the acts it may do, its power to do or to endure are all derived from and dependent upon the charter. To the charter it owes its being, its continued existence, its qualities and properties. The charter defines its duties and affords the only measure of its responsibilities. Every act it performs derives its validity from the charter only; and whenever it deals with another it deals under and according to the charter. In the same manner, whoever deals with it, deals under and according to the charter. Its capacity to contract and to sue and be sued are all derived from that source. *It cannot come into Court without bringing the law in its hand.* It is bound in every case to show that it is acting within the limits of its corporate powers, as defined in that law. There can be no case where the bank is a party in which questions may not arise under the laws of the United States. In every such case it must appear that it was duly created, continues to exist, has power to contract and to bring the suit. All these are matters arising under the

cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or law may be involved in it.

"The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law; but all its actions and all its rights are dependent on the same law. *Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?* Take

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laws of the United States, and under no other. Suppose an officer created by act of Congress, could not Congress confer on him the privilege of suing and being sued in his official capacity in the Courts of the Union? Such an officer has two capacities, private and official, and may be subject to different jurisdictions, according as either is affected. But a corporation has but one capacity, and its faculties cannot be divided. Whenever an authority is given all that is done by virtue of that authority is done under it. Everything done by the bank is done under the charter.

"If it should be contended that the character of the case depends upon the questions to arise in it the answer is, that it is not so restricted by the Constitution; and that it cannot be previously known what particular questions may arise in the progress of the cause. The principal draws to it the incident, or accessory. The character of the case depends upon its general nature. Every suit brought by the bank is for the funds placed in its charge under a law of the United States.

"Osborn vs. U. S Bank, 9 Wheaton, 306, 307.

"In that part of it which relates to cases arising under the constitution, laws and treaties of the Union there is a redundancy in the language: 'ALL cases.' The pleonasm is here meant to perform its usual office, to be emphatic. It marks the intention and affords a principle of construction. The additional terms, 'all cases in law and equity' also serve to heighten the effect and to show that noth-

the case of a contract, which is put as the strongest against the bank.

"When a bank sues, the first question which presents itself, and which lies at the foundation of the cause is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any court? This depends upon a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions and they exist in every possible case. * * * * * *

"The question forms an original ingredient in every cause. *Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be*

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ing of this essential power was to be put to hazard. Surely such a clause must be construed liberally.

" Osborn vs. U. S. Bank, 9 Wheaton, 309.

AGAINST THE JURISDICTION it was *inter alia* said by counsel:

" It was also contended that every right that accrues to the bank in its corporate character, upon which a suit can be maintained, is to be regarded as arising under the charter, and, consequently, under a law of the United States. But the jurisdiction of the Federal Courts, if it attach at all, must attach either to the *party* or to the *case*. The party and his rights cannot be so mixed together as that the legal origin of the first shall give character to the latter. A controversy regarding a promissory note or bill of exchange cannot be said to arise under an act of Congress, because the bank, which is created by an act of Congress, has purchased the note or bill. Neither the rules of evidence, nor the law of contract can be regulated by the National Legislature. But, in the case supposed, no question can arise, except under the law of contract and the rules of evidence. No law of Congress is drawn into question, and its correct decision cannot possibly depend upon the construction of such law. The bank cannot come into the Federal Courts as a party suing for a breach of contract or a trespass upon its property; for neither its character as a party, nor the nature of a controversy can give the Court jurisdiction. *The case does not arise under its charter. It arises under the general or local law of contract, and may be determined without opening the statute book of the United States.*"

Osborn vs. U. S. Bank, 9 Wheaton, 814, 815.

relied upon. The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense and must depend on the state of things when the action was brought. *The questions which the case involves then must determine its character, whether those questions be made in the cause or not.*"

Speaking of an action on a contract, the Court continue:

"The Act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by that charter" (p. 825).

Although "a suit brought by the bank may depend, in fact, *altogether* on questions unconnected with any law of the United States," still the Federal jurisdiction attaches (p. 826).

"The plea in bar may be payment, if the suit be brought on a bond, or *non-assumpsit* if it be brought on an open account, *and no other question may arise* than what respects the complete discharge of the demand" (p. 826).

* * * * * *

So a case under the patent law "arises under a law of the United States, yet the defendant may not at the trial, question the validity of the patent, or make any point which requires the construction of an Act of Congress" (p. 826).

* * * * * *

"It is said that a clear distinction exists between the *party* and the *cause:* that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the Courts of the United States, as give that right to the bank."

This distinction is not denied; and if the Act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the bank arises out of this law (p. 827).

SO IN THE CASE AT BAR, the liability of the defendant "must originate in, and be sustained by its charter." Such liability can arise or exist under no other law.

THE COMMON LAW gave no right of action for the act sued for resulting in the death of the person injured.

Insurance Co. vs. Brame, 95 U. S., 754.

The Legislature of Texas in substance, adopted Lord CAMPBELL'S act, and created a remedy in favor of the wife and mother.

Two questions, both federal, here necessarily arise:

1. Does the *State* enactment apply to a *federal* corporation such as the defendant? This involves a construction of the nature and effect of the Act of Congress chartering the defendant.

2. If the State enactment does apply to the defendant, the further question remains, does the charter of the defendant, *which alone defines the powers and duties*, make it liable for such an act as that of which the plaintiff complains? This can only be answered by a con-

struction of the defendant's Congressional charter.

It is impossible to eliminate this ever-present federal ingredient from the case.

Railroad Co. vs. Mississippi, 102 U. S., 135, reviews the cases and restates the established doctrine of this Court as to what are cases arising under the laws of the United States.

Two classes of adjudications will now be referred to, applying the principles of Osborn's Case to cases like the one at the bar.

1. Adjudged cases under the provision in the Pacific Railroad charters that these companies "shall be able to sue and to be sued in all courts of law and equity within the United States." And 2. Adjudged cases holding that the Pacific Railroads may remove cases of this character under the Act of March 3, 1875.

1. It has been decided twice by Mr. Justice MILLER, under this language, that the Circuit Court of the United States has jurisdiction of *original suits* against the Union Pacific, without reference to the citizenship of the adverse party. Thus in Smith vs. Union Pacific Railroad Company, 2 Dillon, 278, the plaintiff, a citizen of Ohio, brought suit against the Union Pacific in the United States Circuit Court for Nebraska, to recover damages for injuries re-

ceived while in the employ of the company as brakeman. The company demurred, on the ground that the Court had no jurisdiction of the company or the subject matter of the action; and the cases of the U. S. vs. Deveaux, 5 Cranch, 61; Bank vs. Martin, 5 Peters, 479; Osborn vs. Bank, 9 Wheat., 738; Bank vs. Bank, 4 Wash. C. C. R., 168, were cited by counsel. The Court sustained the jurisdiction, saying:

Mr. Justice MILLER: "I have examined the previous decisions of the Supreme Court of the United States supposed to have an important bearing on the question now presented; and, after reflection, am still of opinion that Congress intended to make the defendant capable of suing and being sued in the Federal Courts which have jurisdiction of the same class of actions between other parties."

So, in Bauman vs. Union Pacific R. R. Co., 3 Dillon, 367, the action was originally brought in the U. S. Circuit Court in Nebraska, by a citizen of Nebraska against the defendant company, which moved to dismiss for want of jurisdiction in the Court.

Mr. Justice MILLER: "The question is whether the defendant is suable in this Court by a citizen of the State of Nebraska. Under the charter of the defendant company, I have heretofore held that it was suable in this Court by a citizen of another State (Smith vs. Union Pacific Railroad Co., 2 Dillon, C. C. R., 278), and I am of opinion, upon consideration of the provisions of the charter, that it may sue and be sued in this district without reference to the citizenship of the adverse party."

In Hughes vs. Northern Pacific Railroad Company, U. S. Circuit Court, Oregon, October Term, 18 Fed. Rep., 806, the plaintiff, a citizen of Oregon,

brought suit in the United States Circuit Court for the District of Oregon, to enjoin the Northern Pacific Company from building a bridge over the Willamette River near Portland. The company insisted that it was authorized to build the bridge under its Congressional charter. The Court held that the Act of March 3, 1875 (18 Stats., 480), conferred jurisdiction, because there was a *suit arising under a law of the United States.* Of course this was clear. In further discussion of the question of jurisdiction, DEADY, J., says:

"Whether the Court also has jurisdiction of the suit on account of the citizenship of the parties, it is not now necessary to determine. The plaintiff is a citizen of Oregon, and it is assumed by the demurrer that the defendant is also. But the status of the defendant in this respect is not settled by any adjudication that I am aware of. It has been sued in this Court by a citizen of another State as a citizen of Oregon, and submitted without question to a trial of the case and a judgment against it accordingly.

"It is a corporation created by an act of Congress, with ability 'to sue and be sued' in all courts 'within the United States,' and is authorized and empowered to construct and operate a railway in this and other States of this Union. The capacity 'to sue and be sued' does not of itself authorize the defendant to sue and be sued in any court, irrespective of the jurisdiction pertaining to the same; it only enables it to sue or be sued as a natural person might, in any court having otherwise jurisdiction of the controversy."

Man., N. B., &c., vs. Black, 8 Blatch., 138.

"But of what State, if any, the defendant is a citizen of is not so clear. In Orange N. B vs. Traver, 7 Saw., 210, this Court was inclined to the opinion that a banking corporation formed under the general banking act of June 3, 1864 (13 Stat., 99) to do business in Massachusetts was a citizen of that

State. And such was the conclusion reached by Mr. Justice BLATCHFORD in Man. N. B., etc., vs. Black, *supra*. See Main vs. Second N. B., etc., 6 Biss., 26. But the defendant is organized to exist and do business in more States than one, without any declaration or provision indicating a particular domicil or principal place of business in any."

"But in Osborn vs. United States Bank, 9 Wheat., 816, it was held by the Supreme Court that a corporation created by an Act of Congress, might be thereby authorized 'to sue and be sued' generally in the Circuit Courts of the United States, and the power of Congress to give such Court jurisdiction of such a suit, was sustained on the ground that any suit by or against such a corporation was necessarily a case arising under the laws of the United States, and, therefore, within the scope of its judicial power."

"*And since the decision in that case Congress, by the Act of 1875, supra, has conferred upon the Circuit Courts jurisdiction in all cases arising under the law of the United States. The effect of this legislation, under the ruling in Osborn vs. United States Bank, supra, is equivalent to a special clause in the charter of the Northern Pacific, authorizing it to sue and be sued in the Circuit Court in all cases.* "But the jurisdiction of the Court on the ground of the nature of the controversy being clear, the question as to the authority of the defendant to construct the bridge is next to be determined."

The judgment of this very careful and able Judge is that the effect of the Act of March 3, 1875, in view of the decision in Osborn vs. The Bank, is "equivalent to a special clause in the charter of the Pacific roads, authorizing them to sue and be sued in the Circuit Court in all cases," and not alone in cases in which the issue to be tried is one necessarily and directly involving the construction or effect of some particular clause in the Congressional charter. In other words, in his judgment every case, since the passage of the Act of March 3, 1875, against one

of the Pacific roads, is a case arising under the law of the United States, over which, therefore, the Circuit Court would have original jurisdiction or jurisdiction by way of removal.

2. The case of the Union Pacific Railroad Company vs. McComb, 17 Blatchford, 610, 1880, distinctly presented the sole question as to the federal jurisdiction *via* removal over the Union Pacific Company under the act of March 3, 1875. The company as plaintiff sued McComb in the Supreme Court of New York for an accounting of certain securities belonging to it, alleged to have been fraudulently received and converted by the defendant. McComb removed the cause into the Circuit Court. The petition for removal states that the plaintiff is a corporation created by an Act of Congress and that the suit and the matters in dispute therein arise under the laws of the United States. The ground on which the motion to remand was based is that the matters in dispute in the suit "in nowise concern, or are involved in, or are controlled by, any laws of the United States, except in so far as the same may be concerned by the fact" that the plaintiff was incorporated by an Act of Congress.

BLATCHFORD, J., says: "The 2d section of the act of March 3d, 1875 (18 Stats. at Large, 470), provides for the removal of a suit 'arising under the Constitution or laws of the United States,' by either party to such suit. This enactment is warranted by the provision of Section 2 of Article 3 of the Constitution of the United States, that the judicial power of the United States 'shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States' &c. Under the principles laid down in the decision in *Osborn vs. The Bank of the*

United States (8 Wheat., 738, 819), it must be regarded as settled that a suit by a corporation created by the United States is a suit arising under the laws of the United States.

"The allegations of the petition, above recited, are sufficient to show that the suit arises under a law of the United States. The case is not like that of Gold Washing Co. vs. Keyes (6 Otto, 199). In that case, the corporation was not one created by an Act of Congress, and the petition for removal, which was made by the corporation and others, did not state facts sufficient to show that the case, which was a suit against the corporation and others, arose under the laws of the United States. In the present suit, the mere allegation that the plaintiff is a corporation created by an Act of Congress shows that the suit is one arising under the laws of the United States.

"The motion to remand the suit is denied."

It may be, and to sustain the present motion it *must* be clear, that this decision "is so frivolous as as not to need any argument to show its unsoundness;" but if so, it has plenty of good company. Thus, in *Cruikshank vs. The National Bank*, Circuit Court, District of New York, 16 Federal Reporter, 888, WALLACE, Circuit Judge, in discussing the Act of 1875, as to causes arising under the Constitution and laws of the United States, says:

"It seems to have been intended to confer on the Circuit Court all the jurisdiction which, under the Constitution, it was in the power of Congress to bestow. What is meant by a case arising under the laws of the United States, as expressed in the Constitution, has not been doubtful since the case of *Osborn vs. The Bank*, 9 Wheat, 738. It was there decided that any suit in which a law of Congress was of necessity an ingredient in the case, was a case arising under a law of the United States, notwithstanding the main controversy might depend altogether on questions unconnected with any such law." He adds: "It was decided by this Court, in

Union Pac. R. Co. vs. McComb, 1 Fed. Rep., 799 (same case, 17 Blatchford, 510), that a suit by a corporation created by act of Congress is a suit arising under the laws of the United States, within the meaning of section 2 of the Removal Act of 1875. A suit brought against such a corporation must fall within the same category. *Every act of such corporation derives its legal complexion and attributes* from the law which creates it, and endows it with the faculty of acquiring rights and committing wrongs. A suit cannot be maintained against it without invoking the law of Congress."

To the same effect is the judgment of Mr. Justice MILLER in Turton vs. The Union Pacific, reprinted in full *infra*, p. .

The only case which can be claimed to hold any other view is that of Myers vs. The Union Pacific Railway Company, 3 McCrary, 578; same case, 16 Federal Reporter, 292. The suit of Myers, together with one of the City of Kansas [now on the docket of this Court], were each brought against The Union Pacific Railway Company, to wit: the new consolidated company in respect of the railroad and franchises acquired by consolidation from the Kansas Pacific. The Myers case was one to recover damages for personal injuries caused by the defendant's negligence. The case of the City of Kansas was one wherein the city sought to restrain the defendant from the exercise of the right of eminent domain. We have before us the petition for removal in the last-named case, which is based alone on the proposition that by the consolidation, the defendant company, to wit, the Consolidated Company, became a corporate organization under the laws of the United States, and claimed a removal under section 640 of the Revised Statutes on the ground that it had a

defense arising under the laws of the United States, hereinbefore referred to, to wit, the Pacific Railroad Acts of Congress; and praying a removal under section 640. A motion was made to remand, and the question mainly discussed was the validity of the consolidation. It was claimed by the plaintiffs that the consolidation was void; and that the defendant could not in law be "*organized*" under the laws of the United States. In his opinion, given with doubt and hesitation (see concluding sentence), McCRARY, J., says:

> "Upon consideration of this motion, I have reached the following conclusions:
>
> "1. It is not necessary to decide the question so much discussed by counsel as to the validity of the agreement of consolidation. I assume that it is valid, and, upon that assumption, hold:
>
> "2. That the present suit is not one arising under the Constitution or laws of the United States, within the meaning of the second section of the Act of Congress of March 3, 1875, providing for the romoval of causes from the State to Federal Courts.
>
> "3. That a suit, by or against the Union Pacific Railway Company, a corporation formed in the manner disclosed in the record, is not necessarily a suit arising under the laws of the United States so as to be removed on that ground from a State to a Federal Court."

He then comments on and seeks to distinguish the case of Osborn against the Bank, adding:

"I am authorized to say that Mr. Justice MILLER concurs in these conclusions."

Cases squarely the other way:

Union Pacific Railroad Company vs. McComb, 17 Blatchford, 510; *ante*, p. .

Cruikshank vs. Bank, 16 Fed. Rep., 888; *ante*, p. .
Turton vs. Union Pacific, 3 Dillon, 366; *post*, p. .
Texas vs. Texas Pacific Ry. Co., 3 Woods, 308; *post*, p. .
Kain vs. Texas Pacific Ry. Co., 3 Cent. Law. J., pp. 12, 13.

The defendant in error refers also to the case of Hartell vs. Tilghman, 99 U. S., 547. The case is not applicable. What was decided there by a majority, four judges to three, is set forth with sufficient accuracy in the head note:

"A suit between citizens of the same State cannot be sustained in the Circuit Court as arising under the patent laws of the United States, where the defendant admits the validity, and his use of the plaintiff's letters patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention. Relief in such a suit is founded on the contract and not on those laws."

No reference is made in this case to the case of Osborn vs The Bank, and other establishing a like principle; and it is conceived not to be inconsistent with them.

Application of foregoing principles: test and demonstration of Federal character of the case at bar.

The United States Bank under its charter could sue in the U. S. Circuit Court upon a bill or note, and if the only defense were payment or the State statute of limitations, the Federal jurisdiction under Osborn's case attached and remained.

Under the charter of the Union, Northern or

Texas Pacific Companies, either of these companies can sue originally in the U. S. Circuit Court on a contract for freight or in assumpsit of any kind, and if the answer be in denial, or payment be pleaded, the jurisdiction is clear. Such a case is the same precisely as Osborn's case; and in both cases there is but ground of jurisdiction, to wit, that they *are cases arising under the laws of the United States*, that is to say, under the Federal charter of the bank in the one case, and under the Federal charter of the railway company in the other; and this, although both could be tried without opening the statutes of Congress. So much is clearly and indisputably settled.

Now suppose the United States Bank Charter were still in force, and the bank should sue or was sued in contract in a *State* Court. Could it not remove the case under the Act of March 3, 1875?

If a given suit, when *originally* brought in the U. S. Circuit Court, is one arising under the laws of the United States, is not the same suit one arising under those laws if originally brought in a *State* Court? Undeniably so; and if so, it conclusively follows that it could be removed under the Act of 1875. If this would be the result in the supposed suit against the bank, it is equally the result in the actual suit against the present plaintiff in error.

In short, after a careful study of *Osborn's* case, we have been able to reach no other conclusion than that the federal jurisdiction in the case at bar cannot be denied without overruling that case, and the salutary and necessary principles on which it rests. If Congress is of opinion that the federal jurisdic-

tion ought not to extend to cases arising out of the ordinary operations of these federal railways in the States where they are situated, it may so enact. The remedy must come from the Legislature and not the Courts, and the latter, it is submitted, ought to guard against the ever-present, unfelt, but none the less strong and often irresistible tendency to supply, by "judicial legislation," what the Judges feel to be defects in the laws as they stand, which a judicial judgment, in their power to render, would so easily amend, correct and improve. The mischief of their so doing is that *pro tanto* it converts the Court into an irregular and subordinate Legislature at the cost of its own dignity and function, and so paves the way for reciprocal legislative inroads and for its own confusion.

If the case were on the merits, we should feel confident that the foregoing cases and the reasons on which they are founded, establish that it is one that arises under the laws of the United States, and was therefore removable under the Act of March 3, 1875.

The conclusion is supported by the cases to be referred to under the the next head.

II.

THE SECOND GROUND OF REMOVAL WAS UNDER SECTION 640, REVISED STATUTES.

It is not denied by the defendant in error, but expressly conceded (printed Motion, p. 5), that the

Texas Pacific is a corporation created by and organized under a law of Congress.

The petition of the defendant for removal was verified, as required by section 640, and expressly stated, "that your petitioner has a defense to said action, arising under and by virtue of a law of the United States, to wit, the said act of incorporation," approved March 3d, 1871, namely, the charter of the Texas Pacific Company.

The objection to the petition was (Record, p. 2), that it presented *no facts*, constituting a defense, arising under the Constitution and laws of the United States; that the fact therein stated as a defense, viz., the alleged incorporation of the defendant under the laws of the United States, being manifestly no defense herein (Record, p. 11).

This view was sustained by the trial Court and affirmed by the Supreme Court, which in its opinion in this case (Record, p. 69), refers to the case of the Texas and Pacific Railway Company against McAllister, 59 Texas.

By referring to the opinion of the Supreme Court of Texas in the case of Texas and Pacific R. R. vs. McAllister, 59 Texas, it will be seen that the right of removal in that case was based alone upon section 640 Revised Statutes. There is no discussion of the Act of March 3d, 1875.

And the Supreme Court of Texas held, while admitting the conflict of decisions on the point, that it had the power to pass upon the sufficiency of the petition for removal, and that the mere statement in the petition that it was a corporation chartered by the United States and had a defense under its act

of incorporation was not sufficient to entitle the defendant to a removal.

While we are of opinion that the removal in this case may be well warranted by section 640, yet the right to a removal under that section is, perhaps, not as clear as under the Act of March 3d, 1875.

Judicial construction of Sec. 640, Rev. Stats.

It has been expressly held by BLATCHFORD, J. under the Act of July 27th, 1868 (15 Stat. 226, now Rev. Stat., Sec. 640), that

"A petition under the said Act stating that the defendant has a defense to an action brought arising under an Act of Congress, giving the title of such Act, is sufficient, *although it does not state what the defense is, or what are the facts which constitute it.*"

Jones vs. Inter-oceanic Steam Navigation Company, 11 Blatchf., 406.

See also

Fisk vs. Union Pacific Ry., 6 Blatchf., 362.

Same case, 8 Blatchf., 243.

The same point, to wit, that the defendant need not set up in the petition for removal the *facts* showing his defense, was also held in Texas vs. The Texas and Pacific Ry. Co., 3 Woods, 308, DUVAL and MORRILL, JJ. Also by DUVAL, J., in Kain vs. Texas Pacific Railroad, 3 Cent. Law Jour., pp. 12, 13.

The decision of Mr. Justice MILLER in Turton vs. Union Pacific Ry. Co., 3 Dillon, 366, 1875, is precisely in point, since that is a case identical in all respects with the case at bar so far as the right

to removal rests upon section 640 of the Revised Statutes (Act, July 27, 1868), which was the statute construed in that case. The following is the report in full:

"This was an action originally commenced in one of the State courts of Nebraska, by the plaintiff, a citizen of that State, against the defendant, to *recover damages alleged to have been sustained by the plaintiff, caused by the negligence of the defendant in operating its road. Answer in denial was filed in the State Court.* Afterwards the defendant filed its petition in the State Court for the removal of this cause into this Court, stating *inter alia*, therein, that it was a corporation created and organized by virtue of a law of the United States, approved July 1st, 1862, and that it is not a banking corporation, and that it has a defence to and in the said action arising under a law of the United States, to wit. under the act last mentioned. Surety was accepted, and the cause ordered to be removed by the State Court. In the Circuit Court the plaintiff filed a plea to the jurisdiction of the Court, which the defendant denied. The *plea was submitted on an agreed statement of facts, which admitted no defence was claimed to exist, or was sought to be made, under any other law of the United States, than the charter of the defendant.*

12 Stats. at Large, 489.

Mr. Justice MILLER rendered judgment, as follows:

"I am of opinion that the cause was properly removed into this Court under the Act of Congress relating to the removal of suits against federal corporations, and that it may be fully tried here upon its merits. Plea to jurisdiction overruled."

We understand this judgment simply to apply the principle of the Osborn case. We do not understand that it was intended to be overruled in the Myers case; or that it can be overruled consistently

with the judgment of this Court in the Osborn case, and the principles on which that judgment necessarily and avowedly rests.

In order to refer to all of the cases on the subject, we may say that HILLYER, J., District Judge of Nevada, in a case against the Union Pacific Railroad Company, 1873, for a personal injury, held, under section 640, Revised Statutes, that a suit removed upon a petition stating that the defendant has a defence arising under the law of the United States, will be remanded when it appears from the defendant's answer that no such defence is claimed or made; the fact that the corporation is one organized under the law of the United States not being itself enough in his judgment, to give the Circuit Court jurisdiction.

Magee vs. Union Pacific R. R. Co., 2 Sawyer, 447, 1873.

But on the other hand, in the case of Kain vs. Texas and Pacific Ry. Co., 3 Cent. Law Journal, 12, 1876, DUVAL, J., held that the defendant company had a right to remove causes from the State Court both under the Act of July 27, 1868 (section 640, R. S.), and March 3, 1875.

So in the case of State of Texas vs. Texas and Pacific Railway Company, it was held by DUVAL and MORRILL, JJ., that the defendant might remove causes under section 640, R. S. That was a suit by the State of Texas "to recover of defendant company, as forfeited, certain land grants and reservations made and granted to it by the State of Texas."

The petition for removal was based upon section 640, Rev. Stats.

The Court adjudged these three points:

> 1. Under Section 640, Revised Statutes, the right of one of the class of corporations therein mentioned, when sued in a State Court, to remove the cause to the Federal Court does not depend on the citizenship of the parties.
> 2. The truth of averments made by such defendant corporation, in its petition for removal, to the effect that it has a defense arising under or by virtue of the Constitution or laws of the United States, cannot be inquired into or controverted on a motion to remand the cause to the State Court.
> 3. Under said section the defendant corporation may remove a cause, otherwise proper to be removed, from the State to the Federal Court, notwithstanding the fact that a State is plaintiff in the action.

So, also, it has been held that the *Northern Pacific Railroad Company* was entitled to remove causes under Section 640, at any time before final trial or hearing.

> Ely vs. Northern Pacific R. R., 36 Legal Intelligencer, 164. Court Common Pleas, Philadelphia, THAYER, P. J.

III.

THE THIRD GROUND OF REMOVAL WAS BASED UPON CITIZENSHIP: it being stated in the petition for removal that one of the plaintiffs was a citizen of *Virginia*, the other of *Texas*, and the defendant by

reason of establishing its domicile and principal place of business in *Pennsylvania*, a citizen of that State.

This, of course, all turns upon the question whether the defendant is for jurisdictional purposes a citizen of Pennsylvania.

We do not propose to argue this question *on this motion*. It belongs to the merits.

A similar question exists in cases now on the docket of the Court as to the Union Pacific, which has established its *general offices* at Boston, under an express act of Congress.

It is enough *on this motion* to show that there exists fair grounds for argument. An outline of the argument may be briefly indicated:

The petition of defendant for removal, alleges, distinctly, that *its citizenship is in the State of Pennsylvania*, and this petition is verified. The charter of the defendant is an act of the Congress of the United States, approved March 3, 1871.

16 U. S. Stat. at Large, p. 571.

That charter authorizes the construction of a line of railroad by defendant, from the eastern border of the State of Texas, westward through the State of Texas and the territories of New Mexico and Arizona, and across the State of California, on the Pacific coast, at or near San Diego.

It will thus be seen that the *franchises of defendant as a corporation extend over three States and two territories of the Union.* The charter (Section 1) authorizes the defendant's incorporators to meet in

the *City of New York*, and complete organization under the charter. Independently of any provision in the charter, as to the courts that may take jurisdiction in favor of or against this corporation, it cannot be reasonably said that the defendant is confined to any one or two of the States and territories through which its franchises extend, for its place of citizenship. But it can be more properly assumed that, being created by an Act of Congress, and existing alone as a Federal corporation, it would have the right to *select its place of citizenship*, and there locate its general office, for the transaction of its general business. The petition avers (Record, p. 9) that the City of Philadelphia, *State of Pennsylvania*, was selected as its domicile and place of citizenship, and was its habitation at the commencement of this action, as well as at the date of the filing of its petition.

If it be true that it could, under its charter, select any point, outside of the limits of the States and territories, through which it was authorized to construct, operate and maintain a line of railroad, the statement of its petition, verified as it is, that the State of Pennsylvania was so selected, has not been controverted. And the only qestion on this branch of the inquiry is whether, under its charter, the defendant could establish and maintain its office and have its place of business and citizenship in a State or territory into which, or through which, it was not authorized, by the terms of its charter, to construct, maintain and operate its line of road. *The charter is silent as to the general place of business of the company. It does not prescribe any locality*

for the citizenship or general office of the corporation. The record does not disclose the residence of its officers, directors or stockholders. The inference, however, would be, that the City of Philadelphia was chosen as the *locus* of the general office, because more accessible to its stockholders, directors and officers. It is fair to presume that the executive and financial officers of the company resided at the general office. Every inconvenience that would result from having the general office at Philadelphia might result to the people of California, if the general office had been located in Texas.

The doctrine is well settled that a railroad corporation created by the laws of one State, is a foreign corporation as to any other State, and all the rules that apply to foreign corporations apply to it. In Pierce on Railroads, p. 16, it is said:

"A corporation is, for the purposes of the jurisdiction of the courts of the United States, a citizen of the State creating it."

We insist that, as a federal corporation cannot be a citizen of all the States in the Union, it must be held that, as to all jurisdictional questions, it is a foreign corporation. It is said by the same author, p. 17.

"There is, then, no principle of public law which prohibits a State from authorizing a foreign corporation to extend a railroad into its own territory. The corporation still remains one corporation: a domestic corporation in the State which created it, and a foreign corporation in the other; enjoying the franchises conferred by its charter in the one, and the powers derived from the enabling act in the other."

A federal corporation must be regarded as a citizen of each and every State in the Union, or as a foreign corporation, for purposes of jurisdiction, to each one of the States, unless the act creating it shall define the *locus* of its citizenship, and prescribe its territorial limits.

It is frequently necessary to the most advantageous prosecution of a corporate enterprise that the scope of its operations shall not be confined to the limits of a single State. This is particularly true of banking and insurance companies, but distinctly so in the case of railroad companies, whose far-reaching lines render possible easy communication between localities remote from each other. This ease of communication is the result of a unity in management, operation, ownership and control which now dispenses with the harassing incidents and great expense due to frequent changes from the line of one company to that of another, which formerly characterized the transportation of merchandise, or a journey of even moderate length. The necessities of commerce, demanding extensive lines under a single management, have of recent years produced a distinct class of judicial decisions with reference to the rights, duties and liabilities of corporations operating in two or more States. These decisions are as to the effect of a railroad corporation operating a line in a foreign State, by license, by lease, or by consolidation of its own with the properties lying in a foreign jurisdiction. Much depends up on the circumstances of each case, whether the corporation thus entering a foreign jurisdiction will be regarded as a foreign

corporation or as a separate and distinct corporation in no sense foreign to the State which it has entered, but by the circumstances of such entry, domiciled there, and, to all intents and purposes, a domestic corporation, and a stranger in law to the corporation in the adjoining State of which, as a matter of fact, it is an integral part.

Perhaps the leading case in this connection is *Railroad Co. vs. Harris*, 12 Wall., 65. Here, a railroad company was granted a charter by the Legislature of Maryland, authorizing it to construct and maintain a railroad in Maryland and Virginia. The Legislature of Virginia afterwards passed an act which, reciting the Maryland Act, declared:

"That the same rights and privileges shall be, and are hereby granted to the aforesaid company, within the Territory of Virginia, and the said company shall be subject to the same pains, penalties, and obligations, as are imposed by said act, and the same rights, privileges, and immunities, which are reserved to the State of Maryland and the citizens thereof, are hereby reserved to the State of Virginia and her citizens."

This act did not constitute this a corporation of Virginia.

"The permission," said Mr. Justice SWAYNE in this case, "was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before. In its name, locality, capital stock, the election and power of its officers, in the mode of declaring dividends, and doing all its business, its unity was unchanged. Only the sphere of its operations was enlarged."

Railroad vs. Harris, 12 Wall., 65, 81.

In *Williams vs. Missouri, Kansas & Texas Railway Company*, 3 Dill., 267, the Court (DILLON and KREKEL, JJ.), held that a railroad company of the State of Kansas, which had gone into the State of Missouri, in accordance with the laws of that State, and there purchased and was operating a line of railway, must nevertheless be regarded, in Missouri, as a Kansas corporation, and therefore entitled in a controversy with a citizen of the State of Missouri, to have its cause removed to the Circuit Court of the United States. The Court in this case said:

"The object of the legislation of Missouri under consideration is obvious. Without the sanction of the Legislature, a domestic corporation of that State would have no power to sell out to another company all or a part of its road and franchises, and a foreign company, without such sanction, would have no authority to purchase and operate the road of a domestic corporation. The various provisions of the act show that the Legislature designed to encourage the building of railroads, and to facilitate the making of continuous or connected lines, by authorizing, as far as it could, its own companies to extend their roads into other States, and by conferring upon the companies of other States the right to lease or to buy, and operate roads within its limits. But as above observed, *it did not create such companies new corporations*, but simply gave them on the conditions stated the rights, powers and immunities specified in the act."

3 Dill., 273.

See also

Missouri, Kansas & Texas Railway Company vs. Texas & St. Louis Railway Company, 10 Fed. Rep., 497.

Callahan vs. Louisville & Nashville R. Co., 11 Fed. Rep., 536.

Railroad Co. vs. Koontz, 104 U. S., 5.

Ohio, &c., R. Co. vs. Wheeler, 1 Black, 286.
Uphoff vs. Chicago, &c., R. Co., 5 Fed. Rep., 445.
C. & W. I. R. Co. vs. L. S. & M. S. Ry. Co., 5 Fed. Rep., 19.
Johnson vs. Philadelphia, &c., R. Co., 9 Fed. Rep., 6.
Nashua, &c., R. Co. vs. Boston, &c., R. Co., 8 Fed. Rep., 458.
Muller vs. Dows, 94 U. S., 444.
Memphis, &c., R. Co. vs. State, 2 Sup. Ct. Rep., 432.
Central Railroad & Banking Company vs. Georgia, 92 U. S., 665.

CONCLUSION.

The underlying question in the cause is the *legal jurisdictional status* of the defendant company, under the Acts of Congress.

In the complaint (Record, p. 1), and in the proceedings for the removal of the cause, the plaintiff insisted that the defendant was by virtue of certain public statutes particularly referred to (Record, p. 12) a *State* corporation.

These are questions of the gravest moment, and should be argued with care by counsel, and considered with deliberation by the Court.

It is difficult to overestimate their importance, since they involve the inquiry whether this defendant company, and the other *National Pacific Railway*

companies, are entitled to litigate in the Courts of the United States.

We have not had the time to prepare for the argument of these questions, and this brief is not intended as a full argument thereof.

Precisely the same or similar questions exist in the cases of Union Pacific Ry. Co. vs. Kunth, No. 1244, and Union Pacific Ry. Co. vs. City of Kansas, No. 816, now on the docket of this Court, which Mr. POPPLETON and Mr. USHER desire to argue. These gentlemen have examined and studied the subject, and prosecute the appeals in good faith.

Rule 6 may be a "royal road" to a speedy judgment, but its speedy processes are not favorable to the ascertainment of truth, or for that deliberate judicial hearing and judgment such as become all Courts, especially all Courts of last resort, and pre-eminently THIS COURT, WHICH IS ACCUSTOMED TO HEAR AS WELL AS DECIDE.

JOHN F. DILLON,
WAGER SWAYNE,
JOHN C. BROWN,
For the Texas & Pacific Railway Company.

W. D. DAVIDGE,
Of Counsel.

115-172

Supreme Court of the United States.

OCTOBER TERM, 1884.

PHILA BAR ASSOCIATION

No. 797.

THE TEXAS AND PACIFIC RAILWAY COMPANY

vs.

LAURA KIRK.

W. D. DAVIDGE,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 797.

THE TEXAS AND PACIFIC RAILWAY COMPANY

vs.

LAURA KIRK.

STATEMENT.

The plaintiff in error, defendant below, was sued for a tort in a court of the State of Texas, the district court of Harrison county, and filed its petition for the removal of the cause to the circuit court of the United States for that district. The petition was verified by oath, and set forth the commencement of the suit; that the defendant was a corporation created by and organized under a law of the United States (set out by its title), and was not a banking corporation; and that it had a defence arising under a law of the United States, to wit, the act of incorporation, but the nature of the defence was not specified in the petition.

Accompanying the petition and filed at the same time was a bond, in conformity with the requirements of sec. 639, R. S. U. S., which the petition offered as good and sufficient surety. (R., 1, 6, 7, 8, 9, 10, 11.)

The plaintiff filed grounds of objection to the petition, and in them traversed the allegations that the defendant

was a corporation organized under a law of the United States, and that it had a defence arising under a law of the United States, and claimed that the petition was insufficient by reason of the omission to state specifically the defence. (R., 11, 12, 13.)

No objection was made to the allegations touching the commencement of the suit, that the defendant was not a banking corporation, and that the bond offered was good and sufficient surety; and hence, these allegations were admitted. The court overruled the petition, and the defendant excepted. (R., 13.)

The cause then proceeded in the State court, and resulted in a verdict and judgment against the defendant for $12,500, (R., 57,) which judgment was affirmed by the supreme court of the State of Texas, (R., 64.)

The defendant then sued out this writ of error.

ASSIGNMENT OF ERROR.

The supreme court of the State of Texas erred in affirming the judgment of the district court of Harrison county sustaining the order overruling the petition to remove.

POINTS AND ARGUMENT.

1. There was no objection made to the sufficiency of the security offered, and such sufficiency was thereby admitted, as were also the allegations of the petition as to the commencement of the suit, (shown, also, by the record,) and that the defendant was not a banking corporation.

2. The State court could not try the traverse if the allegations were that the defendant was organized under a law of the United States, and had a defence under such a law.

When removal was demanded in proper form, the jurisdiction was changed. The State court could only determine that removal did not follow as a conclusion of law from the facts alleged. If a sufficient case was made on the face of

the petition, the jurisdiction of the State court came to an end, and all subsequent proceedings were *coram non judice* and void, and the defendant lost none of his rights by contesting the case in the State court after it wrongfully refused to give up jurisdiction.

R. R. Co. *vs.* Kountz, 104 U. S., 5, 14.
Steamship Co. *vs.* Tugman, 106 U. S., 118, 122.
R. R. Co. *vs.* Mississippi, 102 U. S., 135.
Removal Cases, 100 U. S., 457.
Insurance Co. *vs.* Dunn, 19 Wall., 214.
Kanouse *vs.* Martin, 15 How., 198.
Gordon *vs.* Longest, 16 Pet., 97.

3. The conditions of removal prescribed by S. 640, R. S. U. S., (Act of July 27, 1868, 15 Stat., 227,) were literally fulfilled.

There was a suit commenced in a court other than a circuit or district court of the United States. The defendant was a corporation organized under a law of the United States, and was other than a banking corporation.

A petition was filed, "verified by oath, *stating* that such defendant has a defence arising under or by virtue of * * * a law of the United States." Good and sufficient surety was offered.

Thus there was exact compliance with the postulates of removal.

It is urged that the statute was not complied with, inasmuch as the particular defence was not stated. The answer is that the conditions of removal rested exclusively in the discretion of Congress, and that the statute, in terms, required the defendant to state *that it had a defence, under a law of the United States, not what such defence was.*

The design of Congress evidently was that the particular defense should be stated in the circuit court which could try and determine, not in the State court, which could not.

The scheme of the law is very simple. It assumes that the trial of the question of jurisdiction in its entirety, law

and fact belongs to the Federal forum, and that the defendant ought to have the benefit of such trial in the beginning by removal instead of at the end by writ of error, and to effectually secure that benefit and prevent all inquiry by the State court into the character and sufficiency of the defence as an element of jurisdiction, it provides that for the purpose solely of removal and trial of the question of jurisdiction, the declaration or claim of the defendant that it has a defence shall stand as the equivalent of the defence itself.

Such a provision is not unusual when the forum to try is the object of legislation.

Had the law provided that the defence should be specifically set forth, State courts might have claimed, with some appearance of reason, the right to decide upon the defence in its connection with the question of jurisdiction, which was the very thing sought to be prevented.

This case abundantly illustrates the wisdom of the lawmakers, for here the most explicit language failed to arrest the greed of the State court. But, whatever the theory of the law, its words are plain; and, if it meant anything else than what it says, *quod voluit non dixit.*

The judicial construction of the law has uniformly been that the defence need not be stated.

Jones *vs.* Inter-Oceanic Nav. Co., 11 Blatch., 362.
Fisk *vs.* Union Pacific, 6 Blatch., 362.
Fisk *vs.* Union Pacific, 8 Blatch., 243.
Turton *vs.* Union Pac., 3 Dill., 366.
Texas *vs.* Texas and Pac., 3 Woods, 308.
Kain *vs.* Texas Pacific, 3 Central L. J., pp. 12, 13.

On behalf of the defendant in error, Gold Washing Co., *vs.* Keys, 96 U. S., 199, is relied on.

But that case has not the remotest relation to what the petition in the State court must state under section 640.

The case was a writ of error to the circuit court for the district of California. The error assigned was the remanding

a case which had been removed from the State court. The motion to remand "was submitted upon the record sent from the State court." (P. 201.) All that was decided was that the courts of the United States being of special jurisdiction, the facts necessary to give jurisdiction must appear in every suit, and that if the petition for removal, filed as part of the record in the circuit court, does not show the jurisdiction of that court, "and the omission is not afterwards supplied," the cause must be remanded. The removal was under the act of 1875, and the remarks of the court as to the proper practice are confined to removals under that law, which does not provide specially for what the petition shall contain, but leaves that subject for the application of general principles; and the court expressly declares that "the present case is not to be considered conclusive upon any question, except the one directly involved and decided." (P. 204.)

Certainly this case did not decide that it was not for Congress to prescribe the conditions of removal, nor that, when Congress had specially prescribed them, as in section 640, compliance with them did not work a removal, though taken alone, and without subsequent pleadings, in the Federal court, they would not sufficiently state the jurisdictional facts required to appear upon the record of that court.

But to proceed: That there could be a defence under the act of incorporation, which would be a defence arising under a law of the United States, will hardly be questioned. Such a charter is none the less a law of the United States. It is of no avail to say that no defence arising under a law of the United States was made. The defendant was not obliged to make it *coram non judice*.

Cases first above cited.

The State court wrongfully holding on to jurisdiction after the removal by operation of law, its proceedings and the judgment of the Supreme Court are nullities.

4. The act of March 3, 1875, s. 1, vests in the circuit courts

original cognizance, concurrent with the courts of the several States, of all suits (involving the prescribed amount) within the judicial power of the United States, except those in which original jurisdiction was by the Constitution given to this court, and such as were of admiralty and maritime jurisdiction.

The grant of jurisdiction is in the very words of the Constitution, and, subject to the above limitations as to amount and admiralty and maritime jurisdiction, comprehends all the jurisdiction which Congress could confer upon the inferior judicial tribunals. The grant is plenary and exhaustive.

Section 2 adopts the language of section 1 as to jurisdiction, and provides, in substance, that the right of removal shall be co-extensive with the jurisdiction of the circuit courts.

A suit against a corporation created by and organized under a law of the United States, is a suit arising under a law of the United States.

Osborn *vs.* Bank U. S. (1824), 9 Wheat., 738, 823, 826, 827.

Bank U. S. *vs.* Deveraux (1809), 5 Cranch., 61, 85, 86.

For the argument of this proposition the court is respectfully referred to the brief filed in the case of the Union Pacific Railway Co. *vs.* Myers, No. 291 of this term.

If the status of the defendant made the suit one arising under a law of the United States, the petition alleging such status stated specifically the ground of Federal jurisdiction.

W. D. DAVIDGE,
Attorney for Plaintiff in Error.

115 + 142

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

NO. 797.

THE TEXAS AND PACIFIC RAILWAY CO.

vs.

LAURA KIRK.

Brief of

W. HALLETT PHILLIPS
and A. H. GARLAND,
for Def't in Error.

WASHINGTON, D. C.:
R. O. POLKINHORN & SON, PRINTERS,
1884.

In the Supreme Court of the United States

THE TEXAS AND PACIFIC RAILWAY CO.
vs.
LAURA KIRK.
No. 797.

Brief of W. Hallett Phillips and A. H. Garland,
for Def't in Error.

This action was instituted in the District Court for Harrison County, Texas, to recover damages for the death of plaintiff's husband, caused by the gross carelessness and negligence of the defendant company.

The defense set up consisted in the denial of any negligence, and that the accident occasioning the death of Kirk, happened through causes over which the defendant had no control.

There were two petitions for removal filed by the Company. The first petition contains the same allegations as are found in the McAllister case. This petition was filed *May 2, 1881.* R. 6.

The second petition which was filed *May 13, 1881,* besides alleging that defendant was a corporation organized under a law of the United States, and that the case was one arising

under the laws of the United States, contains this additional averment:

> "And petitioner further shows that the said Georgeanna Kirk, one of the plaintiffs to this suit (as to whom the cause subsequently abated), is now, and was at the beginning of this suit, a citizen of the State of Virginia; that Laura Kirk, the other plaintiff herein, is now a citizen of the State of Texas, and was such at the date of the institution of this suit; and that your petitioner is a private railroad corporation, created by an Act of Congress, approved March 3, 1871, and an Act amendatory thereto, approved May 2, 1872; and that said corporation has fixed its domicile and principal business office at the City of Philadelphia, State of Pennsylvania, as it was empowered by law to do; that the meeting of the stockholders and directors of said corporation are appointed for and held in said city of Philadelphia, and that the home and domicile of said corporation is at Philadelphia, and that said corporation is in contemplation of law, a citizen of Pennsylvania, and was such at the date of the institution of the suit." R. 9.

A removal was refused by the State District Court, and on the trial there was a verdict and judgment for the plaintiff in the sum of $12,500 actual damages. R. 57.

To reverse this judgment the Company took an appeal to the Supreme Court of Texas, where the judgment was affirmed.

Among the errors there assigned was one that "The court erred in not removing this cause upon the *filing of the petition and bond for removal.*" R. 62.

And the bill of exceptions recites: "Be it remembered that on the trial of the cause, the defendant, on the *5th of May, 1881, filed its petition and bond for the removal of this cause, which motion to remove* was by the court overruled, to which ruling defendant excepted." R. 59.

The Supreme Court of Texas, in its opinion, say:

> "The petition for removal is in all material respects the same as was the petition for removal in the case of *Texas and Pacific Railroad* vs. *McAllister*, 59 Texas. In that case it was held that the petition for removal stated no sufficient grounds therefor. In this case no authority or reason has been brought forward, inducing us to doubt the correctness of the decision made in the case referred to, and, without again giving the reasons given in that case, we hold that the petition for removal was insufficient, and that the court below did not err in retaining and trying the case. It is not urged that the application was sufficient under any other of the removal Acts that the Act of July 27, 1868, (Sec. 640, R. S.); hence we deem it unnecessary to consider it under any other." R. 65.

It thus appears that the only error complained of before the Supreme Court of the State, and the only question of removal, which that court passed upon, was the question presented in the first petition for removal, to wit: that the petitioner had a defence arising under the laws of the United States.

The petition for removal, filed May 13, on the ground of *citizenship*, never appears to have been brought to the attention of the State District Court, or if it was, it was afterwards abandoned. It was not passed upon by the Supreme Court of the State, nor was its refusal by the lower court assigned for error before the Supreme Court.

It is the judgment of that tribunal alone, which this court is authorized to revise. To sustain the jurisdiction it must not only be shown that a Federal question was raised in the court of original jurisdiction, but that it was also raised and actually decided by the tribunal whose judgment is sought to be reviewed.

We might, therefore, say nothing further on the subject of the petition of May 13.

It is clear, however, that the point attempted to be raised by it, possesses no merit.

The first petition and the one which was acted on, asks for a removal by reason of the *subject matter involved;* the second petition asks for a removal on the ground *of citizenship.*

The petitioner is alleged to be a citizen of Pennsylvania. Yet it is claimed to be a corporation created by the laws of the United States. If not a citizen of Texas, the presumption would be that the corporation is a citizen of the United States. But to sustain the jurisdiction of the Circuit Court of the United States, citizenship of the United States consided apart from citizenship of some *one of the States*, is not sufficient.

The sole foundation for the assertion that the Company is a citizen of Pensylvania, is rested on the ground that it has its principal office in that State, and that *it has fixed* its domicile there.

This not enough to constitute citizenship.

The line of railway of the Company is wholly within the limits of the State of Texas. As shown in our brief in *Texas & Pacific R. R.* vs. *McAllister*, the road of the Company is operated by virtue of the consolidation of the Texas and Pacific Railroad with the Southern Pacific Railway Company, and the Southern Trans-Continental Railway Company, both of which corporations were chartered under the laws of Texas. The consolidation was effected by virtue of authority conferred by those laws.

By such consolidation, the Texas Companies did not surrender their charters, but became merged in and are now represented by defendant as their successor.

The consolidated company therefore must be regarded as a citizen of Texas.

Stephenson vs. *Tex. & Pac. R. R. Co.*, 42 Tex., 167.

A similar question as to the effect of consolidation is discussed in brief for the defendant in error, in the case of *Union Pacific R. R. Co.* vs. *Kansas City*. We refer the court to the authorities there cited.

In the brief of Mr. Dillon and others, submitted on our motion made at the last term to affirm the judgment in the present case, a Federal question is attempted to be raised independent of the fact of the incorporation of the Company.

It is there said that the right of action for damages resulting from the death of plaintiff's husband, is given by State statute and not by the common law. That a Federal question arises of whether the State enactment applies to a Federal corporation such as the defendant. That if it does apply, the further question remains whether the charter of the company, makes it liable for the act complained of. Brief p. 22.

The bare statement of these propositions, we submit, is sufficient to show that the suit does not really or substantially involve a dispute within the jurisdiction of the Circuit Court.

If it were otherwise, then every imaginable suit in the State Courts brought under State law against a person who should choose to allege that he had a defense under a law of the United States, would present a case arising under that law, although it was not pretended that the law contained any provisions regulating the liability or the right of action. The court would have to construe the law in order to determine, whether the action could be prosecuted against the defendant.

Thus, every suit against a person claiming under the patent laws, would be a suit arising under those laws, because the court might be required to examine them in order to see if the action was prohibited.